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THE LAW OF NATURE AND NATIONS IN SCOTLAND.

EDINBURGH:
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d.1.

THE

LAW OF NATURE AND NATIONS IN SCOTLAND:

BEING THE LECTURES DELIVERED IN SESSION 1895-96 IN THE UNIVERSITY OF GLASGOW, INTRODUCTORY TO THE THREE COURSES OF

I. *Philosophy of Law, General and Comparative Jurisprudence:*
II. *The Law of Nations, or Public International Law: and*
III. *International Private Law.*

BY

WILLIAM GALBRAITH MILLER, M.A., LL.B.,
ADVOCATE.

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1896.

PREFACE.

THE Law of Nature and Nations held an honoured place among the subjects studied in Glasgow University during the eighteenth century, forming as it did the main topic of treatment from the Moral Philosophy chair. To Adam Smith, who held that chair from 1752 till 1764, belongs the honour of separating the new science of Economics, of which we may see the germs in certain chapters in the works of Grotius and Pufendorf.[1] Glasgow being his own country, it is only now, after the lapse of 130 years, that the people of Glasgow have been able to found a chair of Economics to commemorate his connection with the University.

The decline of legal studies at the commencement of the present century was as conspicuous in Oxford, Cambridge, and Edinburgh as it was in Glasgow.

When the revival took place in Glasgow in 1878, I was invited to give a qualifying course on "Public Law." I treated this subject as still the old one of the Law of Nature and Nations, but, in compliance

[1] Even in Stair and Bankton it is interesting to notice what are to us irrelevant economic remarks, evidently derived from the same sources.

with the demands of modern science, divided my course into four short ones of—(1) Philosophy of Law; (2) The Law of Nations systematically and doctrinally treated; (3) The History of the Law of Nations; and (4) Private International Law. In order to meet the requirements of the new Ordinances, the University Court have made three separate courses, involving from 120 to 140 lectures or class attendances in each academic year, and they have done me the honour of entrusting these courses to my care. It may be interesting hereafter to know precisely the view which I take of the scope of the various subjects, and I have therefore ventured to publish these Lectures.

Pope Nicholas expected the University of Glasgow to have two Faculties of Law,—the one of the Canon and the other of the Civil Law. Mr. Rashdall, in his recently published work on the Universities of Europe, says (II. 305-6): "The earliest extant statutes, those of 1482, make it plain that the University was intended by its founder to be one of the Bologna pattern,—a Student University; a desire no doubt inspired by the ambition that his University should become a great school of Law."

In 1831 the Rosebery Commissioners reported (Gen. Rep. xii. 54): "The real interests of the community

may be most materially sacrificed if the course of study of law shall be adapted wholly to the supposed convenience of a portion of the Students. The country is deeply interested in the character, the independence, and influence of the advocates to whom the defence of their property and liberties may be entrusted; and it will be in vain to hope that the independence and character of the Bar can be maintained, if the study of Law is not conducted on an enlightened and philosophical plan.

"The great extension of the subject only renders it the more important to provide that the instruction of the Students shall not be limited to the details of a technical art, the philosophy and science of Law sacrificed, in order to furnish materials for the Manual of a Practitioner."

In 1893 the present Commissioners enacted (Ordinance 31)—

"With regard to the University of Glasgow—

. . . . . .

"(4.) The following professors shall constitute the Faculty of Law:—

"The Professor of Law.
" Forensic Medicine.
" Conveyancing."

According to the interpretation put upon this Ordinance by the University Court, the Commissioners have suppressed Queen Anne's chair of the Civil Law; *and now not one of the compulsory subjects for the degree of Bachelor of Laws is represented by a professor.*

The degree in Canon Law—*Decretorum Doctor*—has apparently survived, though its Faculty has long ago disappeared. The Theological Faculty take D.D. as representing *Sanctæ Theologiæ Doctor.* The degree in the Civil Law (LL.D.) has met a worse fate. The Universities have forgotten that the laws referred to are Justinian's. Even in the days of Dr. Reid degrees in Law were conferred after examination on deserving students. In the University of Aberdeen, down to the time of the 1858 Commission, the regulations for obtaining LL.D. were similar to those for obtaining M.A. In the first of the following Lectures I point out the attitude of unconscious hostility to Law perhaps necessarily assumed by Theology and Medicine, and now the teaching profession have secured special Doctorates in Literature, Science, and Philosophy for those who possess special qualifications in any of these subjects; while the Doctorate in Civil Law is conferred on those who cannot take these

degrees, or even on persons who possess no academic qualification whatever.[1]

The General Council of Glasgow memorialised the Commissioners to put an end to this anomaly, for the practice of the Scottish Universities as to degrees in Law is unique, if not in Christendom, at least in Great Britain, while in the Scottish Universities themselves the Law Professors are the only ones who are not permitted to examine for and award a Doctorate in their own Faculty. The Commissioners no doubt have aimed an Ordinance at the acknowledged abuse by demanding reports with special reasons for conferring the degree, but they forgot that it is easy first to give a degree and to find reasons afterwards. The influence of the Arts and the Science Faculties must now therefore be added to those of the Theological and the Medical as opposing forces to be reckoned with. The matter of degrees is a small one, but for that very reason it affords important evidence of the position of legal studies and of the Faculties of Law in all the Universities. It is the straw which shows

[1] The honorary degree should be reserved for those who contribute to the science of Law, or who do distinguished work in the legislative, judicial, executive, or administrative departments of Government, imperial, local, or municipal.

how the wind blows, and its importance has been exaggerated by the refusal of the other Faculties to give any assistance towards the reform of the manifest abuse.

It rests with the legal profession in Glasgow to do as the clerical, the medical, the engineering, and the teaching professions have done with their subjects, to demand that the Faculty of Law—the most ancient and the model of all the others—shall be restored to its former place in the University. In fighting for themselves and for Law, they are fighting the battle of the University itself. And to this battle I may, perhaps, be pardoned for applying the words of von Ihering: "In Kampfe sollst Du Dein Recht finden. Von dem Moment an, wo das Recht seine Kampfbereitschaft aufgibt, gibt es sich selber auf."

It is, however, a profound mistake to imagine that legal and political studies are a matter of mere professional interest. The general public is as vitally interested in these as in other subjects of academic study. And yet we find that in Scotland, without reckoning the chairs of Forensic Medicine and of Economics, there are only eight endowed *chairs* of Law in all the four Universities, and even of these five have been devoted or diverted to the teaching of merely professional

subjects; while for the teaching of Presbyterian Theology there are at least eight fairly endowed and fairly equipped *Faculties* or *Colleges*, besides the colleges of other religious denominations, and four richly endowed Gifford Lecturers as an antidote. These facts throw a curious light on the state of the higher learning in Scotland.[1]

It is no exaggeration to say that the Faculty of Advocates has supplied the place of a great national University, and the title of "Advocate" has been judicially recognised as equivalent to "Doctor of Laws," and so conferring the title to teach in the Universities, for to this hour admission to that body is granted after the formal defence of a Latin Thesis on a title of the Pandects. But not in Law alone, but also in Literature, Philosophy, and History, many of the greatest Scottish writers have belonged to this Faculty. It is a body of university graduates—a great number English and foreign—larger than the teaching staffs of all the Scottish Universities put together, with greater leisure and no drudgery of teaching. It is democratic

[1] The present distinguished holder of the chair of "Law" in Aberdeen has actually revived the Civil Law in that University, where it had been given up for dead. The proper title of this chair and of the Glasgow one is Professor of "Laws," *i.e.*, the Civil Law as opposed to "Decrees"—the Canon Law.

in its constitution, and the great library of Scotland is its property.

But all this is no excuse for suppressing the Faculties of Law in the Universities, any more than it would be for abolishing the Universities themselves. There are often more than 200 Law Students in regular attendance in Glasgow, and there is therefore room for at least two Law Faculties in Scotland.

Glasgow people boast that their city is the second in the British Empire, and its growth may not unfitly be compared with that of the great American cities, but it could surely afford to rival these also in the endowment of learning. Glasgow might spend on Law studies as much as all the Scottish Universities put together now spend, and yet fall short of the provision made by some American and Continental Universities.[1] The Commissioners have drawn up a

[1] Shall we now have to add Asiatic? While Glasgow has been hesitating and waiting, Japan has founded six Law schools. In the Faculty at Tokio, one of these, there were in 1891 nineteen professors, among whom the subjects were distributed as follows:—1. Civil [Municipal] Law, two professors; 2. French Law, three; 3. Roman Law, two; 4. Philosophy of Law, one; 5. Penal Law and Penal Procedure, three; 6. English Law, four; 7. German Law, one; 8. International Law, Public and Private, two; 9. Administrative Law and Science of Administration, two; 10. Civil Procedure, one; 11. Practical Exercises in Civil and Penal Law, one; 12. Public Law (Constitutional) and also Statistics, one; 13. Political Economy, Finance, &c., two.

fairly adequate scheme of legal studies. What the University now asks is, that the public of Glasgow and the West of Scotland should endow a chair in each of the subjects necessary for the Bachelor's degree. In asking this we are not demanding anything superfluous; we are asking the public to remove a stigma from the University, and the City with which it is associated.

W. G. M.

39 Albany Street, Edinburgh,
April 1896.

The professors of English Law lecture on the English constitution, and those of Public Law give a course on the Japanese constitution. Some of the professors take more than one subject, but this is intellectually an advantage both to themselves and the Faculty. With the exception of an American, a German, and a Frenchman, they are all Japanese, and hold diplomas or degrees from Paris, Lyons, London (Middle Temple), Yale, Columbia, Harvard, Jena, Strasburg, or Göttingen. The leading text-books, English, American, French, and German, including Montesquieu and Austin, have been translated into Japanese. (*Revue de droit international*, XXIII. 195.)

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JURISPRUDENCE IN GLASGOW.

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By the ordinance of the Scottish Universities Commissioners for graduation in Arts, one of the alternative subjects in the department of Mental Philosophy is "Philosophy of Law." By a subsequent ordinance it is provided that the course of study for the Law degree shall include "Jurisprudence, General or Comparative, during a course of not less than forty lectures." Do the phrases quoted indicate three or two distinct subjects, or are they alternative titles for the same subject?

In the University of Edinburgh one course is delivered by the professor of Public Law and the Law of Nature and Nations, which qualifies for both the Arts and the Law degree. The answer of Edinburgh, therefore, to our question is that the titles refer to the same subject. In Glasgow, which is the only other University in Scotland that attempts to give a full law course,[1] the University Court in 1893 insti-

[1] Aberdeen, which down to the passing of the 1858 Act was in the habit of conferring only LL.D. as an *ordinary* degree, has this year for the first time given B.L., but this is truly an Arts degree in the department of Law, like the English B.A. It is less of a Law degree than the Oxford B.A. in the department of Law, though the letters are understood to stand for *Baccalaureus Juris*. In Glasgow and Edinburgh it appears to be meant as an inferior degree, for solicitors in particular.

tuted a lectureship in "Philosophy of Law," and when the ordinance for Law graduation was passed, they changed the title of the lectureship to "General or Comparative Jurisprudence." As we shall see presently, there can be no room for doubt as to what the Commissioners meant by giving the student a choice of subjects in Jurisprudence, and by copying the exact words of the ordinance the court perhaps intended to avoid giving any opinion on the question raised. The easiest mode of achieving this would have been to use simply the title "Jurisprudence"; but as matters stand it is impossible to say whether they thought the phrases were synonymous or whether they preferred to leave to the lecturer the choice of the subject to be taught. But in this latter case they should have made the lectureship on *both* subjects,—General *and* Comparative Jurisprudence. The mercantile formula "$\frac{\text{and}}{\text{or}}$" perhaps expresses more accurately the position that all parties wish to assume, and the position that circumstances will compel both students and professors to assume.[1]

It may be presumed the Commissioners found the phrases originally in the Oxford University statutes. "General Jurisprudence" comes immediately from

[1] The Oxford Calendar would have shown that, although the subject demanded in that University for Law degrees was "Jurisprudence, General or Comparative," the title of the Corpus Professor was merely "Professor of Jurisprudence."

Bentham, Austin, and the English school. "Comparative Jurisprudence" is probably due to Sir Henry Maine, and "Philosophy of Law" was doubtless adopted out of deference to the memory of Professor Lorimer. Without anticipating, it may be observed that the typical authors just mentioned looked at Law from quite different points of view. English jurists regard the Philosophy of Law—*Naturrecht*—as "made in Germany,"—as a mere system of elaborate trifling.[1] Professor Lorimer either ignores Austin or treats him with contempt as a word-spinning definer of the most external parts of Law. Maine may be regarded as an archæologist. If, therefore, we take Austin's *Jurisprudence*, Lorimer's *Institutes of Law*, and Maine's *Ancient Law* as types of three treatises on the three subjects above mentioned, then we may safely describe them as three distinct subjects, each dealing with one aspect of the phenomenon called "Law." The three subjects undoubtedly run into one another, and are always treated together by writers on any one of them; but it is just as easy to treat them separately as it is to treat separately such subjects as psychology and ethics. The poverty of the Scottish Universities, and the necessity of treating subjects which would

[1] Professor Pollock takes what I may venture to call a more just view in his *Science of Politics*, p. 110, than he does in *Essays*, p. 20. The common sense—or Hamiltonian—school, to which Professor Lorimer belonged, has now few professed followers in Scotland.

pay the professor, have had a tendency to exaggerate arbitrary distinctions of subjects. In a well-equipped institution overlapping of courses may be a distinct gain to the student, and so there would be nothing absolutely extravagant in having three separate professors dealing each with one of the subjects in question.[1] Each subject represents at least a distinct type of mind or method, and it may well happen here as elsewhere that the paucity of teachers may be partially remedied by the fact that each new professor in the same chair may probably teach a different subject; and his teaching, if he has anything to say, will be continued after his death by his published writings.

The lax use of the word "Philosophy" as equivalent to "Science" must not be forgotten. Thus we speak of Natural Philosophy and Philosophical instruments. So Austin gave as an alternative title to his *Jurisprudence* the phrase, "The Philosophy of Positive Law." Dr. Broom's "Philosophy of Law" is merely an outline of English law, and could not be mistaken for a treatise on the same subject as Ahrens treats in his "Philosophie de droit." On the other

[1] In the Faculty of Political Sciences organised by M. Pradier-Fodéré in 1874-80 for the Peruvian Government, in the University of Lima—the most ancient on the American Continent—there were separate chairs of Encyclopedia and of Comparative Legislation. But he distributed International Law among four chairs. — *Annuaire de l' institut de droit international*, 1878, p. 356, 1880, ii. 337.

hand, the late Professor Amos has published a work on Jurisprudence under the title "Science of Law." Philosophy may thus mean any systematic treatment of general principles, as in the following remarks by the Rosebery Commissioners when referring to the retention of *Conveyancing* as a chair in the University of Edinburgh:—"The class of Conveyancing, having been introduced into the University, should be permitted to remain, although, from the nature of it, much doubt might still be entertained how far it is suited to become a part of college education. It is an art rather than a science, although there may be blended with it much that can be comprehended under the 'Philosophy of Law.'"[1]

There can be no doubt the Continental use of the word "Jurisprudence" has influenced the usage in this country. In France and Germany Jurisprudence refers to a body of general principles, usage, and precedents applied by the courts—a sort of common law—outside of their codes. Bentham approaches this when he speaks of local and universal jurisprudence.[2] Local jurisprudence is the law of a country. Is not *universal* jurisprudence just *general* jurisprudence?[3] But we frequently see such phrases as

[1] Appendix to Gen. Rep., 7th Oct. 1831, p. 187. See p. 54, where the phrases occur, "General Principles of Jurisprudence," "Philosophy and Science of Law."

[2] *Morals and Legislation*, p. 325.

[3] *Cf.* "The Philosophy of Language: Comprehending Universal

"Maritime Jurisprudence," and it was probably imitation of French writers that caused George Joseph Bell, in the second sentence of his book of *Principles of the Law of Scotland* to speak of "The Civil Jurisprudence of Scotland." In Mr. Reddie's *Science of Law* we find the phrases Universal Law, *Jus Universum*, *Jurisprudentia Naturalis*, and so forth. He holds (p. 87) that if it is treated inductively, "it signifies little whether the science . . . be called *Jus naturæ et gentium* or natural law, or, in the phraseology of Professor Hugo, the philosophy of positive law." This was written in 1840.

The Commissioners have abolished the title "Medical Jurisprudence," applied to one of the chairs in the Faculties of Law and of Medicine. This subject does not deal with the relations of medical men to the community, nor *inter se*, and is not jurisprudence. It is merely a corner of the law of evidence, if it deals with law at all. It really treats of certain classes of facts where questions of anatomy, physiology, toxicology, and others are raised in legal investigations. There are precedents and analogous cases, but they are not binding like decisions of the judges. Chemistry may discover infallible tests, but no legislature puts them into its statute book. In the same way we might have "Forensic Agriculture,"

Grammar, or the pure Science of Language, &c.," by Sir John Stoddart (*Encyclopædia Metropolitana*).

"Forensic Engineering," "Forensic Chemistry," "Forensic Navigation," according to the class of facts which were involved in the case before the court. It is satisfactory that the Commissioners have rescued the word "Jurisprudence" from this abuse. The next step must be to make the subject, for graduation purposes, alternative, not to proper law subjects, but to such subjects as I have just indicated, agriculture, engineering, chemistry.[1]

The use of the word Jurisprudence is due to the Roman Law. It was skill (*prudentia*) in *jura*,—all relations, human and divine. The definition is famous: "Jurisprudence is the knowledge of all things, human and divine—the science of the just and the unjust." Merlin, in his *Repertoire de Jurisprudence*, defines Jurisprudence as the science of Law, and quotes the Roman definition. He points out the close relation between law and religion, and says that the jurist must know both, in order to administer the law and protect the true religion. This author then proceeds logically to inform us that jurisprudence demands in like manner a knowledge of geography, chronology, and history, for without them law would not be intelligible, and

[1] As the most common references to medicine are not now forensic, but occur in legislation and the administration of laws of Public Health, Contagious Diseases, &c., the title Forensic Medicine is too narrow. "State Medicine" or "Legal Medicine" are also open to criticism, though less objectionable.

concludes thus: "The knowledge of all other sciences, and of all arts and trades, of commerce and of navigation, enters in like manner into jurisprudence, there being no profession which is not subjected to a certain regulation dependent on rules of justice and equity. All that refers to the *status* of persons, property, contracts, obligations, actions, and judgments belongs also to the domain of jurisprudence." This passage puts in an extreme form the ambiguity caused by confusing form and matter, and the mistake made in speaking of *Medical* Jurisprudence, and treating medical science as if its relations to law differed from those of other departments of human knowledge and activity.

In the preface to his *Jurisprudence*, Professor Holland notices two facts: (1) That he got no assistance whatever from works on the Philosophy of Law (*Naturrecht*), but, on the other hand, German treatises on the *Pandects* were useful for his purposes; and (2) that, as Sir H. Maine had previously remarked, Austin was unknown on the Continent.[1] In this respect Scotland goes with the Continental writers, not with the English.[2] Three facts may help to

[1] Austin's work has been now translated into French.

[2] Professor Pollock's *Science of Politics*, p. 112. An examination of Dr. Ascherson's *Kalender* for the current session shows that *Naturrecht* is at present hardly taught in Germany. Is this the spread of materialism? M. de Meulenaere laments the contempt for everything not practical which prevails in Belgium. (Pref. to von Ihoring's *L'esprit du droit romain.*)

explain why this is so. *First*, the subject of Moral Philosophy has always presented abnormal attractions to the Scottish student. It has been remarked that this is a peculiar Scottish study. *Secondly*, the Scottish law student commences his law studies with a fairly thorough course of the Institutes of Justinian, while the great institutional writers, Mackenzie and Erskine, follow practically the same order. And *Thirdly*, the influence of Stair, the greatest institutional writer on the law of Scotland, was thrown on the philosophical side.

Whatever may be the cause, whether Scottish Puritanism, national hypocrisy, or the reaction against Roman Catholic casuistry, the fact remains that Moral Philosophy occupies a place in the Scottish academic course that is not accorded to that subject elsewhere. The treatment of the subject—nay, the very subject itself—varies with the professor. A brilliant litterateur makes it an opportunity for discoursing on anything human. The theologian, the jurist, the psychologist, can each find his own special subject embraced under this title. But fortunately we possess the works of several Glasgow professors whose names are distinguished in the history of Scottish Philosophy, and these give us some idea of what they taught from their chairs. In their hands Moral Philosophy mainly meant a sublimated outline of the Roman Law—in other words, a course

of General Jurisprudence. As there was to them only one true religion—Christianity—so there was only one law—the Roman law,—a veritable law of Nature. The best example of this treatment is Dr. Francis Hutcheson's *System of Moral Philosophy*, in three books, published in 1755, after his death. The first book deals with Psychology, concluding with three chapters on Natural Theology. The remainder of the work—almost exactly two-thirds in bulk—is Jurisprudence. The following portion of the table of contents shows in detail the subjects dealt with.

BOOK II.

. . . . . .

CONTAINING A DEDUCTION OF THE MORE SPECIAL LAWS OF NATURE AND DUTIES OF LIFE PREVIOUS TO CIVIL GOVERNMENT AND OTHER ADVENTITIOUS STATES.

CHAP. 3. The general notions of Rights and Laws explained, with their Divisions.

CHAP. 4. The different States of Men. The State of Liberty not a State of War. The way that Private Rights are known. The necessity of a Social Life.

CHAP. 5. The Private Rights of Men, first, such as are called Natural; and the Natural Equality of Men.

CHAP. 6. The Adventitious Rights, Real and Personal. Property or Dominion.

CHAP. 7. The means of acquiring Property. How far it extends. In what subjects it resides.

CHAP. 8. Concerning derived Property, and the ways of alienating or transferring it.

VOL. II.

CHAP. 9. Concerning Contracts or Covenants.

CHAP. 10. The Obligations in the use of Speech.

BOOK III.

OF CIVIL POLITY.

The order of subjects corresponds exactly with that of a small Latin volume, "Philosophiæ Moralis Institutio," published in a second edition in 1745 for the use of his students in the University. He

describes this as containing "Ethices et Jurisprudentiæ naturalis elementa." In the prefatory address to "The Academic Youth," he explains that there are three parts of Natural Jurisprudence: *First*, Private Jurisprudence, which teaches the rights and laws prevailing in natural liberty; *Secondly*, Economics, laying down the laws and rights by which the house is to be regulated; and *Thirdly*, Politics, which explains the forms of states and their rights in regard to each other. The arrangement is Pufendorf's, adapted from Aristotle, and the definitions of obligations and similar legal terms are those of the Roman lawyers. In adopting this course Hutcheson only followed in the footsteps of his predecessor, Gerschom Carmichael, who, according to Sir William Hamilton, is the founder of the Scottish school of Philosophy. The text-book used by Carmichael, and published with elaborate Latin notes by himself (2d edition, Edinburgh, 1724), is Pufendorf's work, "De officio hominis et civis juxta legem naturalem." A glance at the contents and the opening chapter shows that this is law and nothing else. He discusses from a purely legal point of view responsibility, ignorance, error, and other legal questions which are still of living interest. Carmichael's preface is an extravagant eulogium of Grotius and Pufendorf; and in his very first sentence Pufendorf announces his intention of conveying to beginners "præcipua juris naturalis

capita." Here, then, we have *Naturrecht* pure and simple taught in Glasgow during a great part of last century. The subject may still be traced in the manual of Moral Philosophy published for the use of his class by Dr. William Fleming, Professor of Moral Philosophy, who died in 1864.

Adam Smith in this subject probably followed the traditional treatment, and this may have been the reason why two days before his death he caused his manuscripts on jurisprudence and the law of nations to be burned. His treatises on ethics proper ("Moral Sentiments") and economics ("The Wealth of Nations") had been published during his life. When we regard the amount and the quality of the materials that have accumulated since the death of Smith, and the fact that he had hardly time to acquire the fundamental knowledge of law which is necessary for such an undertaking, we may almost question whether it was possible for him to make anything like a new departure in legal philosophy. Unfortunately jurisprudence, like theology, seems to fascinate the amateur. Much of the literature on that subject might earn for its authors the description applied to Pufendorf, "Vir parum jurisconsultus, et minime philosophus."

We may note also in passing the close relation between ethics and the law of nature and nations, as evidenced by the transfer of professors in Edin-

burgh from the one chair to the other, and in the utter collapse of the law chair, which lasted from the beginning to past the middle of the present century. As the subjects were then treated, it was simply an unnecessary duplication of chairs.[1] We may notice also that in the University of Cambridge Dr. Thomas Rutherforth lectured on natural law in the order of Grotius. But his lectures certainly did not reach the legal profession as similar lectures did in Scotland.

It is common in some quarters to sneer at the "stickit ministers" and other incapables who dealt with abstract law, and the contempt poured upon *Naturrecht* in Scotland is not always couched in the polite language used by English critics. But it would be ungrateful not to acknowledge the debt which law owes to churchmen down to very recent times. In minor details they may have been inaccurate, and where accurate their information may have been nebulous, but they kept the subject of jurisprudence in its academic place, while professional lawyers saw in law nothing but squalid disputes and fat fees, and regarded learning as bounded by a few odes of Horace or a book of Virgil, "in the candidate's

[1] The Rosebery Commissioners declared (Rep. p. 141)—"The fact that the class of Public Law has thus been annihilated is a singular one in the history of literature." The Scottish lawyers had taken a "practical" fit.

option." To these persons all philosophy is an abomination.

The second fact, to which allusion has been made as explaining why in Scotland natural law was not altogether neglected, is that the Civil law supplied the place of general jurisprudence, or the German "Pandects." At the end of last century, in addition to the ordinary classes, there were, both in Glasgow and Edinburgh, senior classes for second year students for the study of the Pandects.[1] Glasgow is in the habit of boasting of only two of its Civil law professors,—the first, William Forbes, appointed by Queen Anne in 1714; and the fourth, John Millar, who held the chair for the last forty years of last century. Forbes' works have long been superseded by more modern text-books, but Millar's treatise on Ranks of Society is still referred to with respect. Mr Reddie[2] says that "before the death of Pothier, but apparently without any acquaintance with his work, Professor Millar . . . had commenced his lectures on the Roman Law and on *General Private Jurisprudence.*" In the time of Millar, who was appointed three years before the retiral of Adam Smith, Glasgow may be said to have been the great law school of Scotland.[3] Mr. Reddie's own books, which

[1] Rep. *ut supra*, p. 138. Dr. Thomas Reid's account of the University of Glasgow.

[2] Science of Law, p. 159.

[3] See Professor Davidson's evidence, *infra*, p. 34.

still command a high price, and are quoted with respect by such writers as M. Théodore Ortolan, show that the subject of Jurisprudence was cultivated in Scotland even in the apparently dark days.

But although the Roman Law occupied a very large share of the student's attention, the teaching of the subject down almost to our own day may be summed up in one word: it was uncritical. The Institutes, Digest, Code, and Novels were all of equal date and of equal authority, and, *a fortiori*, so also were the texts in each of those compilations. Men read their *Corpus Juris* as they read their Bibles. If they found an isolated text that gained a case or helped to establish a point they were satisfied. It was the Edinburgh professor of the Civil law who told the Rosebery Commissioners that he preferred the Institutes to the Digest, because he saw no order of arrangement in the latter.[1] What the professor therefore abstracted was the topics that bore most directly on the needs of practising lawyers; and if you leave out of the Digest slavery, and all the peculiar regulations as to celibacy, the *jus liberorum*, and such topics, the residuum is in reality little more than General Jurisprudence,—very much the course given by such a professor as Hutcheson, only in greater detail and with greater accuracy.

[1] Rep. *ut supra*, p. 139.

It was only a little more general and archaic than the lectures which such a professor as Erskine gave on the law of Scotland.

The third fact alluded to above is the influence of Lord Stair. The final edition of his "Institutions of the Law of Scotland" was published in 1693, and is still, from its intrinsic merit, the highest authority in the law. No man who ever wrote on that law was more fully equipped than Stair. While a very young man he was a regent (professor) in philosophy in Glasgow, was afterwards employed by the government in political and diplomatic negotiations, and finally became Lord President of the Supreme Court. As he explains in his dedication to the King, this work was the result of forty years' study, during twenty of which he had occupied the Bench, the last eleven as President, and it was published after he had retired. His first edition departed from the order of the Civil law, but the later edition was divided into four books, from deference to prejudice. The whole treatise was an attempt to treat the subject from the point of view of substantive rights, and not from the merely formal point of view adopted by Gaius and Tribonian.[1] But the scope of the work cannot be better explained than in the opening section, where he says: "My

[1] Stair I. i. 23. *Cf.* Advertisement prefixed to edition of 1693.

design being to give a description of the law and customs of Scotland, such as might not only be profitable for judges and lawyers, but might be pleasant and useful to all persons of honour and discretion, I did resolve to raise my thoughts and theirs to a distinct consideration of the fountains and principles of the peculiar laws of all nations, which common reason makes intelligible to the judicious, when plainly and orderly proposed, and therefore have always in the first place set forth that common rule of material justice by which mankind ought to govern themselves, though they had no positive statutes or customs, and then showing how these are thence introduced. I have therefore chosen the method I thought fittest for this purpose and the terms most intelligible in common use, and have, as much as I could, forborne the terms of art. No man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world, from whence the interpretation, extensions, and limitations of all statutes and customs must be brought. I have therefore begun with the common principles of law, and thence have laid down the method I now follow, and have explained the general terms commonly made use of in law."

From all this it is evident that Scottish lawyers found the Roman Jurisprudence sufficient for their purposes. They adopted the Roman categories—the

grammar and frame-work of the law, so to speak—and adapted it to modern requirements. In England it was otherwise. There we have the phenomenon of the independent growth of a law greater than the Roman,—as great in wisdom and ideas of justice, but affecting wider interests and more unwieldy in bulk. The labours of Austin were called for by the peculiar necessities of English law, and foreigners (including Scotsmen) thought they had no need to look into his works. But Austin's philosophy was not new; it was all to be found in Hobbes, and had been orthodoxly denounced in every Scottish university for nearly two centuries. His very tabulated arrangements will be found anticipated or suggested by the Analysis of Littleton, prefixed to Hargreave and Butler's edition of Coke's Institutes, published in 1788. Thus even to Englishmen Austin's *Jurisprudence* should not have been a revelation. But his claim to distinction lies in this, that if he did not actually distinguish jurisprudence from politics, he showed that the line should be drawn, and showed others where it might be drawn. This lesson is perhaps still imperfectly appreciated by writers of the school of Ahrens, and particularly by writers on international law.

And now, at the end of another century, a Universities Commission has made the Philosophy of Law and Jurisprudence, General or Comparative, subjects qualifying for graduation. The practical question for

the future is—What courses ought the Universities to supply in order to comply with the ordinance?

When the human mind applies itself to any subject, it commences at the middle. This is the natural mode of proceeding, for there is no other possible. In law, we commence with the concrete cases presented to us, we abstract the elements which we consider essential, and classify them under heads and principles. One class of transactions we call sales, another hirings, and so forth. This involves both comparison and generalisation. Again, we find in the Companies Act, 1862, a provision to the effect that no notice is to be taken of trusts in the register of shares; in the Merchant Shipping Act there is a similar provision as to shares in ships in almost the same words; while in the case of a bankrupt holding an unqualified feudal title to heritage, the House of Lords recently held that his trustee was bound to recognise the right of beneficiaries for whom the bankrupt held in trust. This, in one aspect, was simply a question of Scots law; but it was also a question in general jurisprudence. Can we express the three cases in one rule, or are they really distinct? Austin[1] explains that he means by General Jurisprudence "the science concerned with the exposition of the principles, notions, and distinctions

[1] Vol. II., p. 1108.

which are common to systems of law; understanding by systems of law the ampler and maturer systems, which by reason of their amplitude and maturity are pre-eminently pregnant with instruction." He goes on to speak of necessary principles, and others not necessary but occurring generally. In another passage[1] he says that General Jurisprudence, or the Philosophy of Positive Law, "is concerned directly with principles and distinctions which are common to various systems of particular and positive law." Now, without criticising these statements, we may notice, as we have already done—(*first*) that there are principles and distinctions common to various transactions,—*e.g.*, sale of a slave; a horse; a corporeal movable; a growing crop; a *spes successionis*; gas or water in pipes underneath the streets; it may be by a principal, an agent, a servant, a wife, a son; it may be by written contract, or by a *de presenti* bargain, or by a penny-in-the-slot machine. These are all, even according to Austin, topics of general jurisprudence, and yet they do not involve the comparison of foreign laws or different systems. (*Secondly.*) So far we have dealt only with single transactions; but in a civilised country groups of men have laws peculiar to themselves; some restricted to localities — local customs; some in particular

[1] Vol. I., p. 33.

relations, as tax-payers, merchants, seamen, soldiers, clergy. These are distinct bodies of laws,—ecclesiastical, military, &c. There are principles common to them all which certainly belong to general jurisprudence. (*Thirdly.*) The doctrines of consent, error, fraud, and suchlike belong to many branches of law, and therefore belong to general jurisprudence. The practical distinction seems to be this: in General Jurisprudence we proceed from the multiplicity of details presented to us in actual life and reduce them to their fewest and simplest elements. When we reverse the process, and try to trace any legal idea into all the forms it has actually assumed, or to discover the different ethical, political, or other ideas embodied in apparently identical forms, the science presents itself as Comparative Jurisprudence. In general jurisprudence we neglect differences in order to discover identities. In comparative jurisprudence we assume identity either in idea or form, and search for differences in the element which we assume to vary.

Comparative jurisprudence is at least as old as Gaius, who in his *Institutes* makes frequent reference to foreign laws. The *jus gentium* may be regarded as this subject put to practical uses. Of its modern aspects, deliberate treatment will be found in Burge's colossal work on Foreign and Colonial Laws in connection with their conflicts; but in its more historical

aspects, the revived interest in the study may be dated from the publication of Sir Henry Maine's *Ancient Law.* It is the subject which, in the present universal revival of historical studies, presents the greatest attraction to scientific jurists. In some universities there are special professorships dealing with it, and there has been for now nearly thirty years a society in Paris devoted to this branch of legal science, and particularly the translation and comparison of modern codes. In 1894 a similar society was founded in Berlin, and this year (1895) saw an English society founded in London for the purpose of bringing into focus the work of the 110 English-speaking Legislatures scattered over the British Empire and the American Continent.[1] The literature of comparative legislation promises, therefore, to be overwhelming, apart altogether from the works of Maine, Holmes, Hearn, Laveleye, Seebohm, Morgan, Pardessus, Revillout, and a host of others.

The history of law, to which the Scottish Universities have recently contributed nothing except Professor Muirhead's scholarly and brilliant *Roman Law*, must be treated both under the general and the comparative principle. If we attempt to discover the unity which underlies the law which has prevailed in one country, or the law of a particular subject, such

[1] By some strange oversight Scotland has not been noticed by this society.

as crime in all its successive forms, it will fall under the former; if we compare the law as a whole at different epochs, and ask what were the ideas underlying apparently identical forms, or trace identity of idea into diversity of form, it may fall under the latter. Thus Glanvil and Bracton, Coke, Blackstone, and Stephen, might be treated on the comparative method. In Scotland we might take Balfour and Hope, Stair, Erskine, and Bell, and find that the law at the various epochs was so different, that although the later stages had developed from the earlier, they might profitably be treated as different. Just as we may compare the laws of military, of agricultural, and of mercantile peoples, so we may compare the laws prevailing in one country when the inhabitants have changed from military to agricultural or mercantile. A law forbidding suicide is one thing in ancient Rome and another in modern India, and still another in England; and so the same legal institution may have a different meaning in feudal and in industrial England. Other interesting points of comparison might be to trace the order of development of legal ideas; to compare the growth of English and of Roman law; to trace the growth of Roman law in Continental Europe, and in Scotland, where we are under the powerful influence of England in mercantile law; the application of English law to India, compared with the Dutch law in Ceylon. To all this we

might add researches in native Indian codes, Chinese, Mohammedan, and other systems, where law and religion are not distinguished.

Another important subject, to which nothing has been done in Scotland, is the classification of rights and legal rules. This problem has been attacked by Austin, Professor Holland, and others in England, by Hearn in Australia, and M. de la Grasserie in France; while Germany at this moment is in the throes of a controversy over the adoption of a code.[1] In Scotland we still use Erskine's treatises, whose order is that of Gaius. The weakness of George Joseph Bell's work was his arrangement. But perhaps, as in so many other cases, we shall find the genius who will solve this problem for the modern law outside of our university walls.

There is a tendency in some quarters to treat strings of dry rules and empty forms as the whole of jurisprudence. These persons make comparative jurisprudence a bundle of such strings laid side by side, and history a mere succession of such rules and forms, or groups of rules and forms.

But beyond all these questions of abstraction, simplification, and classification of legal ideas, and their embodiment in laws, and their growth and decay—the grammatical, logical, and historical aspects of law

[1] Law Quarterly (Jan. 1896), p. 17.

—we have a series of ultimate questions which are really metaphysical. These belong to the Philosophy of Law,—the relation of law to other human phenomena, arts and sciences. Can we reduce all legal cases to one definition? What is a person? What is a thing? What is an act? Is knowledge equivalent to assent? What is possession? What is responsibility? All these are questions of philosophy, where an ultimate analysis is demanded by the mind, but where for practical purposes we may be compelled to adopt a very rough solution. To take the last example,—what is responsibility?—we may compare Mr. Bradley's first essay in his *Ethical Studies* with Dr. Maudsley's book devoted to the same subject, and we shall find that the lawyer, the moralist, and the physician look at the subject from quite different standpoints. Hence the conflicts between lawyers and doctors on the subject of insanity. The medical man regards every life he can save as valuable; the saving is to him a personal triumph and an end in itself. The lawyer regards the community as an end, and the criminal as an enemy to be destroyed or eliminated. In laying down the rule (a law) under which he intended to act, the lawyer expressed himself in moral terms. The doctor accepts his rule, and shows that the criminal is acting under a physical impulse, and the moral rule does not apply. If the lawyer had put the homicidal maniac in the same category

as a man-eating tiger, the point would have been taken from much of the medical argument. In practice the difficulty is got over by assuming sanity on the part of the criminal. If we cannot decide whether the man who has murdered half a dozen of his relatives is or is not insane, we give society the benefit of the doubt and hang the man. It is better to hang one man than to run the risk of his depriving many more persons undoubtedly sane and useful of their lives. Once more we see a rough brutal general rule laid down, "Whoso sheddeth man's blood, by man shall his blood be shed;" and then in course of ages distinctions drawn, fictions invented, until the rule becomes the exception. This is a logical process, a characteristic mode in which the human mind acts, and the investigation of the process belongs to the Philosophy of Law. Examples will be found in the law of slander, possession, and in fact in every department where law is developed by decisions or progressive legislation.[1] In the first part of the first *Jahrbuch* of the Berlin Society of Comparative Jurisprudence above referred to, Professor Schuppe of Greifswald contributes a long article to show that there is no philosophy of law apart from jurisprudence. If he means that the distinction between science and philosophy is a vanishing line,

[1] *Cf.* Pollock and Maitland, *History of English Law*, ii. 473, &c.; Stephen's *Digest of Crim. Law*, 424; Pollock and Wright on Possession.

the thesis is not new and will not be seriously disputed; but within jurisprudence proper there perpetually meet us questions of pure metaphysics, and the ignoring of the fact is disastrous in practical results. In all law books we find verbal distinctions, or merely subjective classifications, assumed to be immutable and necessary "laws of nature."

The late Professor Lorimer, who did more than any man of his generation in Scotland for the philosophy of law, devoted his attention too exclusively to the political aspects of the subject, and so laid his works open to fatal criticism by every English jurist who reviewed them. A characteristic example will be found in his treatment of Private International Law in his *Institutes of the Law of Nations*, compared with Savigny's in the eighth volume of his System. Lorimer stops where Savigny begins. But at the same time it must be remembered his views were not accepted on this side of the Border. His achievement was this,—that he was the first professor who had obtained a hearing for the subject in Edinburgh, and his influence really compelled the "practical" people of Glasgow to admit it to their curriculum.

There is yet one other subject which might be profitably treated under the philosophy of law, and that is the history of the various systems of legal philosophy. This subject is treated at considerable length by Ahrens in his *Cours de droit naturel.*

But although the Commissioners have admitted philosophy of law to the Arts curriculum, the Universities both of Glasgow and of Edinburgh have allowed it to count as only half a course, so that the student who wishes to study jurisprudence is compelled to take eight instead of seven subjects for his degree. Austin dealt with only a single branch of the subject, and yet he says[1] that a satisfactory exposition "would fill at the least a hundred and twenty lectures, though every lecture of the series occupied an hour in the delivery and were packed as closely as possible with strictly pertinent matter." Glasgow and Edinburgh cannot allow mere Arts students more than forty to fifty lectures in all the subjects which we have seen are comprehended under jurisprudence and the philosophy of law. Thus the poverty of the universities directly discourages the study of jurisprudence.

If an endowment for a professor of jurisprudence could be obtained, it would be possible for him to give a full course of general jurisprudence, mainly illustrated by the law of Scotland: such a course might fairly be described as Philosophy of Law, in the sense in which this phrase was understood by Hutcheson in last century and by Austin in the present one.[2]

[1] *Jurisprudence*, p. 75.

[2] *Cf.* Austin, *Jurisprudence*, 1117, with Prof. Clark's paper entitled "Jurisprudence, its Use and its Place in Legal Education," in *Law*

This might be a course of encyclopædia, as that term is understood in Continental universities[1]—a general introduction to law for legal students—and at the same time a branch of liberal culture to laymen whose tastes lay in that direction. The other subjects might form honours courses for senior students. If the professor were an archæologist, he might deal with Greek and Roman early systems; if an Orientalist or a Gaelic scholar, he would find suitable material in other ancient codes; if an Egyptologist or Assyriologist, he might deal with some of the legal documents brought to light by recent discoveries; he might give a course on mediæval sea laws, mediæval and modern sumptuary legislation, and laws regulating morals. If he were a psychologist, his materials again are inexhaustible; if a logician, he could discourse on forms and arrangement of categories; if a metaphysician, on the relations of theology, ethics, and science in general, or the history of legal philosophy. The subjects are truly beyond the capacity of a single individual, and every revolution in the history of the world presents new legal problems for solution or old problems in another form. In Europe we have the new

Quarterly, i. 201; and Mr. W. W. Buckland's article "Difficulties of Abstract Jurisprudence," *ib.* vi. 436. Unless jurisprudence is taught in connection with some concrete system of positive law, it must be utterly unintelligible to beginners, as Arts students must be.

[1] Prof. Hastie's *Outlines of the Science of Jurisprudence*, p. 237.

German Empire, and the questions of local government raised in our own country. In America we have the new subject of Inter-State law. In India Messrs. Tupper and Lee-Warner are said to have discovered a new department of law dealing with the relations of Great Britain to the 700 native Indian states. The mistaken attempts to treat these by the law of nations were atoned for in blood and gold. In Japan we have the whole question of consular jurisdiction put again into the crucible. And again, in Europe and America we have the *legal* relations of pools, trusts, and corners to each other, to individual traders, and to the state, sharply raised for discussion. And the old question of religious toleration will always be with us while there is an orthodox majority and a heterodox minority. The history and plans of codification adopted or proposed in France, Germany, India, Turkey, Egypt, America, and Australia, as well as in England, would give material for many courses of lectures.

Is there any possibility of seeing the foundation of a chair of Jurisprudence in the near future? I venture to think there is. During the first half of the present century law had been expelled from the universities. The Public Law chair in Edinburgh had disappeared. In Glasgow and Aberdeen the professors of the Civil Law had been allowed by the universities without remonstrance to teach Scots law

to a few clerks and apprentices for the sake of earning their fees. The General Council of Glasgow University made an unsuccessful attempt to get back the endowment of the Civil Law chair to its original purpose, but though the ruling authorities and the Commissioners apparently gave no consideration to the matter, the University has been compelled to devote a small sum annually to endow a temporary lecturer. In his evidence before the Rosebery Commission Professor Davidson sixty years ago blamed the legal profession in Glasgow for the disappearance of the Civil Law class.[1] And though some discredit must attach to the University for its apathy in the matter, the ultimate blame must rest with the lawyers of Glasgow. But for the last thirty years graduation among lawyers has become fashionable, and in a very few years the men who now can only petition to have the Civil Law chair restored will be in a position to see that this wrong to the University and the higher learning is remedied. Last century Glasgow was little more than a theological school, though it would be uncandid to deny that this school did much more than its own proper work. The well-known superiority of the Scottish parish schools was largely due to the number of divinity students who had no influence to obtain presentation to a charge, and turned their

[1] Report, Evidence, 1837, ii. 145.

attention to teaching, so that in many cases the parish schoolmaster was a better scholar than the parish minister. It must be admitted that the professor of Moral Philosophy, by lecturing on jurisprudence, and the professor of Church History, by lecturing to laymen on political history, to some extent supplied the deficiencies of the law faculty, but the progress of science, both in theology and in law, made this arrangement uncertain and unsatisfactory. During the present century medicine has struggled to the front and appropriated a large share of the ancient as well as of the modern university endowments. In the coming century, and before Glasgow celebrates its quincentenary, if law continues to recover ground as it has done during the last twenty years, it will occupy a position worthy of the traditions of the university, and of the city which has grown up around it, and the cathedral church of St. Mungo.

II.

WHAT IS INTERNATIONAL LAW?

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INTERNATIONAL LAW is that department of the municipal law of each civilised state (being a member of the family of nations) which deals with the relations of the government, or of the individual members of the state, to the governments or to the individual members of other similar states, and which for purposes of intercourse is expressly or impliedly recognised by such other states. Or, amending Mr. Hall's definition, we may say it consists of (*first*) certain rules of conduct which modern civilised governments regard as binding on themselves in their relations with one another—an extension of constitutional law; (*secondly*) certain rules which they themselves enforce on foreigners, or allow foreign governments without remonstrance to enforce on the subjects of the acquiescing government,—an extension of administrative law. To these are generally added (*thirdly*) decisions on particular cases in international politics. The object of this paper is to show that public and private international law are both true branches of positive law in the same sense, and that the ordinary view now adopted as to private international law should be extended to public.[1]

[1] This adopts the view maintained by Sir James Stephen (*Hist. of*

The ordinarily accepted view as to private international law is thus expressed by Lord Justice Lindley:[1] "Various civilised countries take different views of it. . . . This part of the international law, as recognised by the Scotch law, becomes part of the Scotch law; and to my mind this Court [the English Court of Appeal] is not at liberty to review international law so far as it becomes part of the Scotch law. The fact is, of course, notorious to us all, that if anybody studies private international law out of a French law-book he takes one view of it; if he takes an American law-book he takes another view of it; and if he takes a German law-book he takes another view. They do not all take the same view. We have to ascertain and see how much of the international law the Scotch law has incorporated and grafted upon itself." This last sentence must not be taken to mean that any legal system draws rules from a general body of international law, for this exists only in particular systems of municipal law.

In ordinary usage the word "law" conveys two ideas: *First*, a civil law means a definite general statement of a right of a definite class of persons to claim a definite

Crim. Law, ii. 41, &c.), and worked out partially by the late Mr. J. K. Stephen in his interesting Essay on International Law, but at the same time justifies ordinary usage in the wide application of the title "international law." The general view here maintained will be found in my *Philosophy of Law*, p. 85.

[1] 1892, 1 Ch. D. 226.

class of prestations (involving often a definite thing) from a definite class of persons : *Secondly*, a criminal law means the command or the prohibition by the state of a definite class of acts under pain of a definite sanction. The distinction depends at bottom on how the state regards the acts in question, for the grammatical distinction is accidental and formal ; a civil law may be expressed in the imperative mood, and a criminal one in the indicative. In the one case, if one of the persons, or the thing, or the prestation, be indefinite, and in the other, if the act commanded or prohibited, or the sanction, be indefinite, then the statement or command is not strict law. Definition is the essence of law, but it is the definition of a relation which subsisted before, only vague and indeterminate. A legal definition may serve a useful purpose, though it cannot be embodied in one sentence, and may not exhaust all the aspects of the subject defined. Thus, the state is at once as real and as artificial as the single individual in the eye of the law. It was defined both positively and negatively against alien individuals by the Greeks and Romans ; and current events are at this moment defining it in international as well as in internal relations, and yet it is all but impossible to give a verbal definition.

Many devices have been used to secure the definition of law : writing takes a prominent place, as in

the Twelve Tables,[1] to protect against the caprice of an oligarchy; in English charters to protect against the caprice of a monarch; in the American constitution to protect against the caprice of voters; trial by jury—originally a body of men who knew local customs and the character of the parties—serves the same purpose; so also does a law court—a body of experts who know the common law, or who are solemnly sworn to decide justly. We cannot define law merely as what is written or what is administered by the courts, for the very act of writing the law or the creation of a court implies a prior existence of law. These have reacted on the law and revolutionised it, but they do not explain its origin or account for its existence.[2]

All the human beings in the world may be regarded as legally related. The legal world—the world of right—is a single phenomenon in Nature. For practical and scientific purposes men classify relations and legal rules, and call some municipal and some international, but in some aspects every right is international, and in others every right is municipal. It seems, therefore, to be a mistake to speak of municipal law assisting international law. The wrong done to an individual may raise constitutional questions, and may involve ultimately the existence of a

[1] Is *lex* not after all derived from *lego?*

[2] Cf. *Philosophy of Law*, pp. 93, 357, &c.

state. If foreign states interfere, it then becomes international. The wrongs of Lucretia raised a constitutional question. The massacres of Christians in Turkey always raise the question among foreign Christians, how long Turkish rule will last.

Legal rules and legal relations apply only to individuals, actual members of governments, or actual subjects, and to objects really existing, and they are formulated in particular propositions. We must once and for all rid our minds of the idea of a number of unrelated leviathans entering into a compact—an idea which has been well ridiculed by Mr. J. K. Stephen. The rights exist in individuals, for the rights which appeal for vindication are the personal rights of men in their bodies, their property, ships, and other effects. It is their individual debts that are enforced internationally, as in the Mexican war of 1861, and in Egypt by the present British occupation. It is also against individuals that the rights are enforced. Within any state reparation is exacted from the individual delinquent. If the official or the court charged with the duty of giving satisfaction fails in that duty, the law provides remedies,—*e.g.*, in England mandamus by the Court of Queen's Bench, or removal of the offending official, or even "a question in Parliament." A charge of theft might bring about a constitutional crisis by involving the police, the public prosecutor, the Home Secretary,

and the Cabinet. In the same way, if an individual fails to receive satisfaction from a foreign government he may complain to his own government. This government puts pressure on the foreign one according to circumstances. With a civilised state a mere representation will suffice; with others it may involve a change of an inefficient or corrupt government; or it may involve conquest and absorption. The government whose subject is wronged may supersede the other government and enforce justice itself directly.[1] If the government whose subject is wronged refuses to move, it may be swept away and another put in its place. Thus a private wrong may become a public wrong, and the remedial action, when it leaves the municipal sphere, is placed under the category of *constitutional* law if it deals with the relations of citizens of the same state, and under *international* if it deals with a foreign state, or any of its citizens.

And just as the sanction necessarily falls on individuals,—it may be on the culprit; or on the mandarin who refused to execute justice; or on the village which aided and abetted or harboured the criminal, — so it is applied always by individual governments—by two or more in alliance, as Great Britain and France during the Third Empire—or by one "executing the mandate of Europe," as

[1] See speech by Lord Salisbury at Mansion-House, 9th Nov. 1895.

Austria-Hungary in Bosnia and Herzegovina. In the ordinary case one government applies the necessary punishment, while others stand aside. Thus in Africa the European powers have agreed to mark off their respective "spheres of influence."

International law is confined to the "family of nations." A list of civilised states is given in the "Statesman's Year-Book" and similar publications. The list may vary from time to time, but the members may always be definitely ascertained. Unorganised bodies of men—savages and others—outside of this circle are generally dealt with as objects of right, but not as possessing legal rights themselves. If rights are attributed to the individuals, it is by analogy, in the same manner as rights may be attributed to the lower animals; but if such a savage took up his residence in a civilised state, his rights within that state would in general be the same as those of a civilised foreigner.

All this is the result of the fact that man is a social animal. Each man represents his associates or his nation both actively and passively. The murder of an English missionary by a Chinese mob is an insult to *Europe*, and is intended to be an insult. Again, each soldier, each blue-jacket, each policeman, actively represents in his person the justice of the whole civilised world.

But it may be said that there are some subjects

which relate to the state *as a whole.* Examples will be found in the property a state has in its territory; or the claim a state has to fulfilment of a treaty by another; or the claim for an insult to its flag, and so forth. In all these cases the subject falls within the domain of international *politics.* It may be expressed in terms of law for the simplification of the discussion, and a legal solution may be accepted by both parties, but that is merely for the settlement of the dispute. The question is translated into a question of private right. The states are replaced by "persons," and the question is asked, What would A be bound to yield to B in such a case? When the answer is found, the governments on both sides accept it as an answer on the question of their rights and duties. This is the significance of the arbitrations which are so great a feature of present day international relations. There is a question depending between two governments about which they do not wish to fight, or dare not fight. It is better to lose than go to war. They set up a tribunal of quasi-judges; they appeal to law as set forth in documents and treatises,—jurisprudence in a wide sense; they argue by counsel, and they abide by the decision as if they were private persons, or, rather, they enforce the decision as law on their respective subjects. Their subjects acquiesce, for they either have confidence in their governments or cannot resist them. Perhaps this is why Great

Britain is so unfortunate with arbitrations. If the matter were one of life and death, or, perhaps, if it were not a matter of which the government and the public were tired, Great Britain would never submit to arbitration. And the most impartial arbiter cannot but be biassed against a powerful litigant who is prepared to lose his case, and in favour of an opponent who is either weak or passionately eager to gain.

The boundary dispute between Great Britain and Venezuela, which has now been pending for exactly a century, shows how lapse of time may change a political question, so that one side cannot agree to regard it as legal. The territory on the British side of the boundary is becoming occupied, and every year that passes makes it more difficult to abandon any part of the territory claimed by the colonists in British Guiana. While the territory was unoccupied any line drawn by a person of common sense would have sufficed, and therefore legal procedure and arbitration were possible. The inhabitants of the territory would have adapted themselves to the configuration of the boundary accepted by their government. But we may conceive the interests of one side or of the other so vitally involved with retention of the territory actually possessed, that they might be better to fight for it than to run the risk of having it awarded to the other party. It may be noted that the interest of the United States is put in a legal form in the

Monroe doctrine, but for the present their interference is purely political. Of course, while the Monroe doctrine will not be recognised by Great Britain or such colonies as British Guiana, friendly intervention is gladly accepted in the interests of peace.[1]

[1] I have allowed this paragraph to stand as it was read in October 1895. Subsequent events have surprised the world with a new development of the Monroe doctrine. In its original form this is merely a corollary of the right of self-defence, and may be admitted as sound policy on the part of the States. But the inhabitants of British Guiana have the same right. They have no desire to annex Venezuelan territory; and they have no wish to interfere in Venezuelan politics, however desirable it might be that their neighbours should be able to keep order without frequent revolutions. American statesmen know that they cannot themselves interfere with those South American states without making themselves responsible to foreign states to an undesirable extent, otherwise they might have been expected to set up a stable government in Venezuela, and then accept the offers of arbitration made on behalf of Great Britain. The main effect of President Cleveland's Message is to discredit the Monroe doctrine. Many acts of wanton aggression have been justified on the ground of self-defence, and this action of the President seems not dissimilar. The action is political, and the mask only is legal. The conduct of American governments unfortunately tends to irritate European governments. In so great and powerful a state we expect a dignified self-restraint,—we expect it to be slow to move, but when moved irresistible. Though the legal doctrine of non-intervention in Europe is put forward as a policy,—a reasonable result of the Monroe doctrine,—yet in 1848 Commissioners are sent to Hungary to give "sympathy" to a *proposed* republic; in 1873 a Spanish Republic is recognised which cannot survive many months. The United States naturally recognised the Spanish colonies as separate states long before Great Britain did so. It is this tendency to precipitate action, confusing law and politics, and the natural tendency to judge of the conduct of others by their own, which caused so much misunderstanding in the Civil War (see p. 51).

And so, with respect to arbitration, the United States may lay down a law *to themselves* always to resort to arbitration and never to fight, but they have no title to *enforce* arbitration even on South American republics.—(See Despatches of Mr. Blaine and Mr. Frelinghuysen,

It has been pointed out that the British public habitually look at political questions from a merely legal point of view.[1] Many people express astonishment that large bodies of men do not acquiesce in the result of an election,—"the verdict of the people." They treat the most momentous issues as if they involved the awarding of £10 of damages by a jury, and forget that the "verdict of the constituencies" has before now been merely the signal for civil war, when majorities as such do not carry the day.

Where, then, is the line to be drawn between politics and law? The two arts and sciences undoubtedly shade into one another, but the line may be drawn when we follow a rule simply because it is a rule.[2]

Wharton's Digest, i. pp. 336 and 347.) That is to say, a state may make an international law or rule *for the conduct of its own government and its own subjects*,—like the Monroe doctrine or the Cleveland doctrine of arbitration,—but when it lays down rules for its neighbours it must be prepared to supersede or control their legislation and back up its laws by force.

The mistake made by President Cleveland and his supporters is the converse of the British tendency, next referred to in the text. In the one case a legal question that may be solved by consulting maps and construing documents is turned into a political one, and discussed with passion; in the other a question of politics and principle is decided as if it were a matter for a legal decision, any decision being sufficient.

[1] This is merely a particular phase of what Professor Dicey calls "the rule of law" in England.—*The Law of the Constitution*, p. 171.

[2] For example, in early forms of procedure and conveyance. No doubt there is a powerful current in the opposite direction (*Philosophy of Law*, p. 353), for the judges must justify old rules; but the difficulty is overcome in practice by the vagueness and elasticity of rules of equity, which by a legal fiction enable the court at once to satisfy the craving for a rule and do concrete justice.

The rule may be formed unconsciously by instinct or habit, or consciously by a process of reasoning with reference to a certain end,—moral or political. This is law. In politics—the art of ruling the organised community called a state—it may be necessary in special cases to depart from legal rules. The rule may be bad, and may in a particular case be overturned, or it may be altogether reversed. In politics the good aimed at is the existence and continuance of the state. If anything tends to weaken or destroy the state it is bad. In the system which is called the family of nations, it is assumed that each of the states is a good, and is to be preserved. They may struggle, but it must be by peaceful means,—the defeated nations artificially restricting their population, the successful ones pushing their trade into all corners of the world, and starving out unsuccessful rivals. If there were only one state, the problem would be comparatively simple. Plurality of states complicates the problem. In a collision between a European power and an African tribe, the European state is regarded as the sole good, and so the problem is totally different from that where two European powers come into collision. War is an evil between European states, because they are both postulated as ends. In an African battle it is only the European loss of life that is counted.

This distinction between law and politics simplifies

some of the problems that cause most trouble to publicists. It deletes from our international codes at a stroke the whole doctrines of recognition, independence, intervention, and self-preservation.[1] Precedents and rules will never decide whether a body of men who really form a state are to be recognised. Suppose the rule says no, they may compel you to change the rule. If it is a precedent you wish, they will make one. If a government finds that for achieving the ends of its own state it must carry on negotiations with provinces which have hitherto formed part of a friendly state and are now independent, precedents are irrelevant. Their only use is for the purpose of argument with the mother country; and "Historicus" has made very skilful use of them in his discussion of the unfortunate dispute between Great Britain and the Federal government in America. The recognition of the Southern states as belligerents was primarily a municipal regulation for the benefit of British subjects. American lawyers understood and appreciated the step, because it merely followed a similar municipal recognition by the Federal government, but the doctrine had been so perverted in prac-

[1] This is pointed out by Wheaton (Boyd), p. 85. But he retains all the platitudes on these subjects. Legal theories of property and prescription, or of justifiableness of aggression (Sidgwick, *Politics*, p. 288), do not explain the cession of Alsace and Lorraine by France in 1871. The retention of the provinces is purely an act of self-defence by Germany. The great fortresses make the western frontier secure.

tice by American politicians, that with them recognition had almost come to mean a sort of intervention.[1]

It is a commonplace of international law that the form of a state is of no importance to the international jurist. But this doctrine is at the basis of all law. It does not matter whether one, or ten, or a thousand men form the government, their duties are the same, and the rights of person and property they protect are the same. The maxim comes from legal procedure, where a pursuer or plaintiff is merely a name, if his title to sue is admitted. The party may be rich or poor, wise or foolish, young or old, male or female, individual or collective. If the Mikado of Japan or the United States of America sue in a Scottish court, they are in the same position as John White or A. Brown. In this sense, and in this sense alone, are states equal. In international politics it is altogether different. When dealing with a strong government which is supported by its subjects, and can bring an irresistible force to bear on a dissentient or criminal fraction, we are apt to forget the process and deal with the abstraction of the government as if it were the state.[2] But when we deal with such a "mass of structureless pulp" as China at the present

[1] The policy of Congress with regard to Cuba (March 1896) corroborates this statement.

[2] The state is like the mathematical conception of a finite mass placed at a *point*.

moment, we sometimes deal with the supreme government, sometimes with the oligarchy of mandarins, and sometimes directly with their deluded and oppressed subjects. So with Turkey. So also with Russia in a varying degree, but the government there is so strong and so well organised that all transactions take place with the ruling head. It is, however, impossible to read the history of the diplomatic relations between this country and Russia without feeling that the causes of disagreement are due to the differences of the constitutions of the two states,—difference really of personality,—for enlightened statesmen in both countries are sincerely desirous of avoiding conflict.

Take, again, the question of capture of private property at sea. This is a question of politics and not of law. The question is not whether a belligerent has such *a right*, but whether the abandonment of the practice would tend to promote the ends of European and American civilisation. Put to a single state, it may come to be, is it willing to give up the ultimate form of the right of self-defence? If we assume as an axiom that any particular state must exist, and if it is necessary for the protection of that state to capture the property at sea of individuals belonging to the enemies' state, then the right cannot be denied. In the discussion of the subject by the Institute of International Law, the representatives of Great Britain, who argued for the practice, were

outvoted. Great Britain has no wish for war, and has nothing to gain by it, but it would be supreme folly to expect an enemy which envied and attacked this country to be deterred by a paper rule from attacking its commerce. Any state that possesses a world-wide commerce must be prepared to defend it. It is therefore misleading to discuss the right to capture private property at sea as a legal question. It is rather a matter of politics to be dealt with according to circumstances. A law prohibiting capture could come to be incorporated in the maritime codes of civilised states only if we were prepared to affirm that it is better that one of the family of nations should suffer any injustice, or should even perish, than that its sea-borne commerce, or that of its adversary, should be swept from the seas.

But in thus placing these large classes of cases under the head of politics rather than under that of law, we invite rather than exclude the operation of justice. When "Historicus" tells us that the emancipation of Greece was "a high act of policy above and beyond the domain of law," he does not mean that it was merely to serve temporary ends or that right was defied, but he means that it was an act of the highest justice beyond the domain of law in the sense of mere precedent. We can find precedents in history for freeing down-trodden races from oppression, and we can find precedents for extorting just rights by force.

It is therefore possible to express the Greek emancipation in legal phraseology. Again, if we assume that the Turkish empire was an institution to be preserved and maintained at all hazards, then the intervention of the powers against Turkey was wrong, unless indeed the rebellious provinces were cut off, like a diseased limb, in order to save the life of the whole. If we assume that the Greeks were a true nation oppressed and their extermination threatened by aliens in language, religion, laws, and customs, then the intervention was right.

It may well be, however, that it is for the interest (in the highest and best sense) of the European states to make politics follow law—"to pay deference to solemn precedents and established rules." Within the state, politics, like justice and equity, follows the law. Just as in the private law equity criticises and supersedes old rules of law, but again itself becomes a rule, and may even require amendment, so in international relations politics must follow law—become rule—or it may become unjust. The necessity of law —rule and precedent—in European affairs is the result of the mutual recognition of the states,—a sort of balance of power. It is assumed that the *status quo* at any moment is not to be disturbed, or at all events the "Great Powers" are to be kept in their present position. Now this can only be accomplished by looking at all questions from a legal standpoint—

following precedents and recognising the plea of *res judicata*. On any other footing a perpetual war would result. We enjoy peace because we resolutely shut our eyes to the questions of boundaries or of national grouping which might be raised between French and Belgian Flanders, Luxemburg, Holland, and Germany, Alsace and Lorraine, Savoy and Nice, Austria. The problems are soluble only by Omniscience and Omnipotence. Hence the *policy* of modern states is to recognise each other as ends—as parts of one great system—to obey law. The policy is European and American, and the governments enforce it on their subjects in the form of laws. So the Treaty of Washington, drawn up by the Pan-American Congress, proceeded on the assumption that all but really trivial questions between these states were finally settled.[1]

But when we say that governments enforce this policy, the enforcement is only formal. It is at this point that the view here presented diverges from that suggested by Sir James Stephen and Mr. J. K. Stephen. They start by assuming Austin's definition of a law as implying "a lawgiver and a tribunal capable of enforcing it, and coercing transgressors.[2] But we may conceive a government generally intimating to foreigners a law of conduct thus: "If any

[1] See p. 91.

[2] Per Lord Coleridge, quoted Stephen's *Hist.* ii. 32.

foreigner attack or molest any subject or his property, we shall try to capture and punish him, and, failing that, we shall expel all his fellow-countrymen from our territory, or exact reparation from them." We have here a command, a government, and a sanction, but no subject to whom it is addressed. If the native government and the fellow-subjects of the delinquent concur in capturing or punishing him, or in handing him over to justice, we achieve indirectly all the conditions of the Austinian notion of a law. The French and other penal codes contain a clause denouncing punishment on any person who embroils the state with foreigners. Magna Charta, the old Scots acts, all old histories, are full of the doctrine of reprisals. They have proved effective: Europeans have become by habit law-abiding and disposed to treat foreigners with consideration and kindness. A private individual may travel unarmed north, south, east, and west, and no one ever ask even to see a passport. The governments of Europe and America are as ready to help foreigners as natives. Each government is ready to listen to a complaint put forward by a responsible government on behalf of a subject. On the Austinian theory English law commands Englishmen, French law Frenchmen, not to injure any one. But the idea of "subject" must be extended to the merest temporary resident:[1] nor do we forbear

[1] Grotius, *De J. B. et P.*, ii. 11, 5.

applying law until the foreigner has landed. We attack pirates, we pursue smugglers far out at sea, and ask no questions as to their knowledge of our laws. It is not political subjection that creates an obligation to respect law. If a government fails to keep order the subjects may rise against it and make another government which can keep order. It is as correct to define law as a command addressed by subjects to their political superior under the sanction of revolution and removal by assassination or otherwise, as it is to adopt the Austinian definition. And not only by subjects is the command issued, but also by surrounding states. A humble petition from subjects, a diplomatic hint from a neighbour, a royal request, and a royal command may be all fundamentally identical, though couched in different language.

The commands of law, like the rules of equity, are often so vague as to convey no information[1]: *Neminem lœde: suum jus cuique tribue: honeste vive*, if addressed to subjects; or Rule justly, Keep order, Do not oppress, if addressed to rulers. These commands are empty until they are filled up with a content from experience,—external circumstances, history,

[1] Lolley's case is a famous example. This gentleman was advised by counsel that he could lawfully marry; it required twelve judges to find out exactly what the law prohibited; and yet he was sent to the hulks for bigamy. See J. G. Phillimore's *Jurisprudence*, p. 44.

morals, customs, the thousand elements which determine the differences between legal systems. The duties expected from foreigners, or the fictitious commands addressed to them, are fewer and simpler than those duties expected from, or the commands supposed to be addressed to, natives. The points of material contact are fewer, and so men are at once more intolerant and more tolerant. They are more intolerant, for they readily suspend intercourse. They are more tolerant if they must have intercourse. The Greeks excused bad manners because the persons complained of were Romans. A Scots Presbyterian elder has allowed a lady to play her piano on the Sabbath because she was a German. But law is *not* a mere command. Governments of the present day, and indeed from the beginning of time, have only succeeded in getting their commands obeyed when they took care first to find out what their subjects would obey. Modern governments appear to lead most successfully when they discover the direction in which their subjects are marching, and take up a position in front. Every now and then in each great state in turn we see the impotence of government — the black problem of lynching in America, socialism in Germany, brigandage in Italy, agrarian crime in Ireland.

As Heffter has pointed out, the laws dealing with foreigners—international law—have grown up in

exactly the same way as laws within the state. A claim is made and pared down by compromise with a conflicting claim, which is as urgent for satisfaction. A rule is laid down and gradually modified by definition as circumstances transpire, showing that the first rule was too broad. Thus murder and *culpable* homicide (manslaughter) have been evolved from mere homicide. So the rights of states over the sea have settled themselves, when it was found that the claims had to co-exist in space and in peace. It is in the interests of order that English jurisdiction should extend one league round the coast, while French jurisdiction similarly covers all French territory. As we shall see presently, the jurisdiction is analogous to that of county and district authorities within the state. Blockade and contraband have been evolved from a general prohibition of trade during war. This simple fact shows that if the phenomena of municipal and international law are not identical, the relations and analogies between them are very close.

In the evolution of the private law we have the conflicting claims of, say, two individuals. Between themselves they might compromise by splitting the difference or otherwise. But the state interferes on two grounds: (*first*) it has a material interest as representing the material rights of others, who may be affected by the original bargain,—*e.g.*, two riparian proprietors on opposite sides of a stream might

ignore the rights of upper or lower proprietors; (*secondly*) the state has an interest in keeping order and seeing that justice is done between the parties; and, if a dispute actually arises, it sees (*thirdly*) that the decision is one that will be just to those who come hereafter, by establishing a sound precedent. Now, in the case of foreigners, we add the element of a foreign government representing its subjects and demanding in their interest a modification of the claim, keeping order, and acting in a manner analogous to and on grounds identical with those which actuate communities in enacting and administering justice between individual subjects.

But the same phenomenon is met with elsewhere. We have conflicts of tribunals—Chancery and Common Law, Civil and Military, Admiralty and Chancery; and even international, as with the English and Scottish courts in the *Orr Ewing* case.[1] Here the court adopts the cause of a party, and makes it in a manner its own. What started as a private dispute between two individuals may become magnified into a corporate or even into a national dispute. And though, as we saw, all rights, laws, and sanctions concern individuals, their effect always extends beyond the mere individual. We see this even in private affairs. If an employer and a workman contract, they are

[1] Ewing *v.* Orr Ewing, 10 App. Ca. 453.

not merely two individuals. They both may be members of unions, and the contract may be practically settled for them quasi-legislatively by the bodies of which they are members. Again, we personify great industries—the oil trade, for example. "The trade" in America may arrange with "the trade" in Scotland or in Russia how they shall sell their products. The purchase of a gallon of oil is a transaction with perhaps the whole "trade," who fix the price. The price in Scotland may be fixed by the supply in Burmah, and the price in any market may be fixed internationally on the same principle as it would be in the market itself.

Through international law each modern civilised state has universal empire, for it can enforce the rights of its subjects directly against barbarians, and indirectly, through the assistance of friendly states, against delinquents who may take refuge in such states, or it may force foreign governments to act. The presence of a man-of-war of a great power will make a weak but arbitrary government try to find out what is law or justice, and, if necessary, enforce it.

We may notice in passing that the word "morality" applied to international relations refers properly to the conduct of individuals in regard to foreigners, but may be extended by analogy to the corporate conduct of the state or the government as representing it. Those who personify the state and find physical organs

in its body can have no difficulty in assigning it a conscience, and even in localising that organ. The relation of the individual conscience—whether that of the governor or the governed—to the state, and how the conflicts between the individual conscience and the state policy are to be solved, are subjects too large to be discussed here. The moral duty of a statesman is to resign for conscience sake if he cannot approve of the state policy. The remedy to the subject is withdrawal from public affairs or voluntary exile. If he is of the stuff that martyrs are made of, the state will perhaps make the withdrawal permanent or the exile compulsory. In war the soldier generally assumes the policy of his own state to be just. But in the relations of states there do arise obligations which are said to be imperfect as compared with others which permit their vindication by force. The acts complained of may be those of a government or of the great mass of their subjects, and the line between the two classes of acts, as between law and morality, may be drawn at overt acts. Wherever the spirit in which the act or the forbearance is done is more important than the mere act, the act belongs to the sphere of morality; but when the act or the forbearance is of more importance than the spirit, then law may interfere to secure, if it can, the performance of the act, or the forbearance wished. To enforce the higher morality is a physical impossibility, like the attempt to store sunshine by

itself. Hence, in the international sphere, general ill-will and such undignified exhibitions of spleen, especially by private individuals, as we find in some newspapers and books against foreigners are passed over in silence.

If we turn now to the acknowledged text-books of international law, we find the earlier writers either treating all questions as political, on general grounds of equity and justice, or treating them as all legal, and finally and definitely settled; while modern writers tend to distinguish law and politics by putting such subjects as recognition and intervention in chapters by themselves, or by placing a collection of treaties and statutes in an appendix. If we compare the *De Jure Belli et Pacis* with any modern work, we shall find that Grotius devotes the whole of his second book—more than one-half in bulk of the whole treatise—to substantive rights,—property, contract, &c. This has all disappeared in modern books, for they deal with public rights only, while Grotius did not sharply distinguish these from private, and recognised even the institution of private war. Bluntschli devotes to substantive rights really only two vague sections of the utmost brevity.[1] Heffter is not much more prolix, while Hall and even Lorimer deal with the matter only incidentally, so

[1] 516 and 517; 518 is negative.

much so, that they have found no place for the subject in their respective indexes. Now, if the views above set forth are sound, this process of exclusion must be carried further. We may discuss, if we choose, on legal assumptions and from legal premises, questions of recognition—the personality of a state, the right of discovery and appropriation, the extent of territory possessed or prescribed, the right to intervene in quarrels of foreigners—but we must remember precisely what we do in such a process. It merely means that we prefer in our discussions to appeal to the Pandects rather than to the Sermon on the Mount.

If we strike out of our codes and our law-books the topics just mentioned, what we leave is machinery. We have first the rules as to state officials representing each particular state,—ambassadors, consuls, &c. This is an expansion of constitutional and administrative law. For administrative purposes we divide each country into counties, burghs, and cities, with well-defined territorial jurisdictions. In a corresponding manner Europe has naturally divided itself into a number of large units of jurisdiction called states, or the states have combined and subordinated themselves to an ideal system of law,—the state-system of civilisation—the family of nations.

They have each a definitely recognised territory. You can stand with one foot in France or in Belgium and the other in Germany. And just as boundary

commissioners adjust the boundaries of counties and burghs, so boundary commissioners adjust the boundaries between states. When adjusted, the boundaries become law, and are assumed as fact in subsequent discussions.

In naturalisation laws, which are generally confined to individual states, we find a notice to individuals on what conditions they can claim nationality and consequent protection from other governments. It also implies a notice to foreign governments what persons the particular state will claim as its subjects and will protect. These rules inevitably come into collision. Although not usually so treated, the collision should be treated on the same principles as ordinary problems of private international law.[1] The questions are really public, for it is the Continental demand of military service that occasionally makes the subject so important for individuals who claim the protection of perhaps a peaceful and mercantile state against a warlike and military one. The rules of nationality are admittedly municipal. The chief *international* rule now partially adopted is that individuals are at liberty to change their nationality. Between the governments the rule is reciprocity, which is the golden rule, or the acting so that the particular may become a universal law—a law of nature or of nations.

[1] See Bar, Gillespie's translation, 2d ed. p. 127.

Then a chapter is devoted in our text-books to treaties. These are incorrectly described as contracts or promises. They are truly legislation, simultaneous and identical, by two or more states for their subjects. How it is promulgated, or whether it must be ratified or enacted by the legislature, is a detail of constitutional law. Both in Great Britain and America a treaty is frequently enacted in a statute, because otherwise it is not binding as law,[1] *e.g.*, the French treaty as to copyright, the treaty as to traffic in spirits on the North Sea. In such a case the treaty becomes a bill or project of legislation, and the parliament becomes the contracting party. The French Emperor made the great treaty of commerce French law by a decree. Frequently, as in this treaty last mentioned, and in the final act of the Berlin Congress as to slavery, the agreement is to submit bills to the legislative bodies of the negotiating states. Again, an undertaking to pay an indemnity may be regarded as the result of a power to tax. According to the British constitution the making of treaties is a part of the prerogative of the Crown. The Crown regulates by the same prerogative the conduct of the army and navy in war, and so, when the British government assented to the Declaration of Paris, they enacted law for all British subjects. It is true law,

[1] This rule is laid down absolutely by Blackstone, and by Lord Coleridge in the "Franconia," 2 Ex. Div. p. 154.

for it will be administered by the British prize courts. Treaties are valuable, because they lay down after sober discussion rules for the guidance of officials, and so prevent the questions ever reaching a stage when heat might warp the judgment of all parties. Treaties cover the whole sphere of government where foreigners come into contact. They deal with naturalisation, extradition, copyright, trade marks, revenue, coinage, postal and telegraph services, railways, and public health, any matter in short that belongs to administrative and public law in the widest sense.

Here we may place private international law. The development of this subject illustrates the continuity of not only law and politics, but also of the international and the municipal law. It belongs to politics to determine whether we shall buy from or sell to foreigners, if we shall trust them with money, if we shall recognise marriages with them. But the legal problems raised belong to jurisprudence as well as to politics and the allied sciences. It may be necessary to make a treaty allowing the members of two states to trade, but the times do not appear to be quite ripe for codifying by treaties the rules dealing with collisions. *Periculosa est definitio.* Unless they were extremely vague, they might operate unjustly, and, being vague, they would be misleading.[1] But the

[1] Bar, *ut supra*, p. 83.

work of the Institute of International Law and the Society for the Codification of the Law of Nations, together with the contributions of jurists of every nationality, and the numerous reasoned decisions of the courts for the last quarter of a century, will afford useful guidance for legislation. At present each nation works out a set of rules in its own courts, and from historical causes these rules often coincide. It may almost be said that the general principles are identical. And further, by treaty the laws of international copyright, trade marks, and patents are adjusted, and this particular form of private international law has made rapid advance within recent years. But whether common law or statutory, the rules are essentially of the same character—legal rules dealing with foreigners in their private relations. The problem is not exactly the same if both parties are natives, if both are foreigners of the same nationality, if they are foreigners of different nationalities, or if one is a foreigner and the other a native. If both are natives, one pleading a foreign law to support his right, the court and the government do not necessarily come into collision with the foreign government. But there is a convenience in treating as a whole this branch of jurisprudence. It presents a large and convenient group of logical problems—the typical forms of which are truly international. In a general popular sense they are all international, *i.e.*, dealing

with persons, or rights, or laws of two or more different nationalities. At all events, the word in the phrase "private international law" to which hostile critics take exception is the adjective "international," and it is therefore hard to see what benefit is gained by placing it before "private law." It may be suggested that this new phrase is a mere translation of the German "Internationales Privatrecht," but it is very evident that both Bar and his translator, Gillespie, did not consider there was anything vital in this arrangement of the words. Bar uses them as a convenient and well-known expression, and it is therefore a pity that the Universities Commissioners in Scotland have introduced the name "international private law," which is confessedly inaccurate, and cannot be defended by even the excuse of usage which usually covers error. Private international law, therefore, as we may still venture to call it, is the department of municipal law which deals with rights which apparently fall under competing systems of law of different nationality. It is the result of mutual recognition in the family of nations. It is part of the legal machinery by which modern states keep order and vindicate the rights of their own subjects or the subjects of neighbouring states.

The complete assimilation of laws would make many problems disappear, as the "common law" in England superseded local customs. The same problems

must have been solved when each market had its own weights and measures and law. Each state can now make uniform weights, measures, and coinage, while the metric system has by this means overspread Europe, and if it is finally adopted in this country it will be from a sense of convenience. The simplification of laws would have a similar effect, and it may be regarded as the duty of a modern state to simplify its laws not only in the interest of its own subjects but of foreigners. The marriage laws of France, for example, have caused much scandal in this country, and much suffering to individuals. The result is that Englishwomen have been warned not to marry Frenchmen. This is the operation of a natural sanction affecting Frenchmen, who may bring pressure to bear on their own legislature.

If two neighbouring Governments have definite boundaries of their jurisdictions and keep order, the individuals on both sides trade and carry on social intercourse as one community. They accommodate each other with language, coinage, weights, and measures. If these are identical, much trouble is saved. If trade is forbidden, it still goes on under the name of smuggling. Mankind is a unity, and when men feel state divisions to be arbitrary they disregard them or sweep them away.

These topics generally close the great division of relations of states in time of peace. How very

elastic the subject is may be seen from the matters dealt with by Dudley Field in his great Code. To make the subject complete would involve the repetition of the code of every civilised state. Even a statement of rules as to universal coinage, weights and measures, collisions at sea, bills, and so forth, occupies much space. In most text-books we find simply a list of the rules adopted by each country in regard to each special subject. If the tribunals adhere to one rule, and administer it impartially, foreigners will not interfere.[1] But occasionally a foreign state may protest against a particular application of an admitted rule, and so diplomacy reviews even the proceedings of prize courts,[2] which implies an invocation of equity through legislation for the special case. Some publicists, instead of stopping with a statement of the laws actually administered, try to combine them into a general vague statement (like a composite photograph), and call the result the law of nations. It is merely an ideal curve which the actual rules approach.

These relations of peace have been called normal; warlike relations are often called abnormal. "Abnormal" means sometimes unusual, sometimes illegal, and

[1] See Lord Granville's correspondence in case of the "Robert Rickmers," quoted below, p. 80.

[2] Hall, 4th edn. 529; Pitt Cobbett, L. C. 317, and papers therein referred to.

sometimes immoral, in all the various senses of that word. For the greater part of the history of the world war was the usual relation of states. The destruction of Carthage was for Rome both a policy and a law. At the present hour there are some quarters of the globe never free from war. Sometimes "normal" is meant to indicate the higher "norm" in the mind of the jurist who is looking forward to a millenium, of which he already sees the dawn. But suppose some community, or a government in its name, and without effective remonstrance from within, commits some act which in the case of an individual would be called a crime. Suppose it proposes to resist by force any attempt to prevent the recurrence of such an act, would war against it be normal or abnormal? To acquiesce in a violation of the dictates of humanity cannot be in accordance with any high ideal. In truth, the phrases "normal" and "abnormal" are simply a re-statement of the fact that some forty or fifty states recognise each other and act on the presumption that a state can do no wrong. Non-intervention is the legal rule, or the world would become a pandemonium. If each one of the governments does its own work well, it has no time for its neighbour's affairs. When a leviathan has removed all the beams from his own eyes, it is time to look for motes in the eyes of neighbouring leviathans. In the present balance of power between the members of the

family of nations, therefore, non-intervention is normal —a legal rule : war is abnormal—*primâ facie* a crime. But when we go back to the facts of nature, we find war universal and natural. All men fight. In peaceful Britain the struggle is economic, industrial or political, but it occasionally bursts into actual flame. Election riots in Ireland, battles between workmen and capitalist, religious riots in India, race conflicts in America, are the work of the natural man. The function of government and law is to regulate the passions of individuals in so far as these find external expression, and if they cannot prevent fighting, to make it according to rule. On the Continent duelling is still in fashion, and it is natural that international duels should still be possible there, with regulations as to weapons, and where and how the fight is to be waged. These are the laws of war.

Two forces have tended to mitigate the horrors of war —(*first*) military discipline, and (*secondly*) the sentiment of humanity, fostered by some persons in the name of the Christian Church. It must often have been excessively embarrassing to military commanders to find their forces engaged in plundering or in driving cattle instead of fighting; and it must have been an inexpressible gratification to them to find that the dictates of humanity, sanctioned by the highest ideals of the Church, coincided with the strictest necessities of military discipline. There is a Turkish proverb to

the effect that it is not for the sheep's benefit that the crow picks the vermin off its back. And so a military power, if it were to exist, was compelled to enforce discipline. Early Roman military law prohibited indiscriminate plunder. We can trace a line of thought from these old rules through Cicero's book *De officiis*, the works of the Spanish and Italian jurists, down to the American instructions to the Federal army, drawn up by Dr. Lieber.[1] These are all admittedly municipal laws framed to regulate warfare, primarily in the interest of military discipline; and yet in every history of international law they figure prominently, and properly so, for they are truly international as affecting foreigners in the second place.

But in modern times the above considerations are reinforced by the legal assumption that recognised states are an end,—that they are not to be exterminated or destroyed. Underneath the official legal hostility there is a substratum of friendship, past and future, undoubtedly, but ever present. "Our friends the enemy" is not altogether a joke. War is now a legal technical term, though it is popularly used to express relations morally and politically infinitely different. A quarrel between two small Greek states that hated each other, a plundering raid by a great Indian chief, a pitched battle between two modern

[1] See also Manual of Military Law (British) and the Italian Military Code.

armies of professional soldiers, are not the same thing, and naturally give rise to different laws of war.

There are also in modern times large numbers of individuals interested in promoting, as others are in opposing war. Some regard a war as an international prize-fight, in which after a few rounds they may carry off a championship. Others we have seen look on it as an international duel, in which with carefully regulated weapons blood is to be drawn—as little as possible in the circumstances—and "honour" is thus to be satisfied. The howling mobs which are "interested" in football matches, horse races, and prize-fights, find their counterpart in those who at a safe distance gloat over the horrid details of warfare in the pages of realistic novels, or in the vivid descriptions of special correspondents. These persons affect to be horrified at ancient Roman gladiatorial shows or modern Spanish bull-fights, and yet they treat modern armies and navies as bodies of mere gladiators, while others bet on the victory and call it commerce. War is sometimes cynically desired to expedite the flow of promotion in the army, to improve trade, even to supply copy to the newspapers. War may be prevented by turning these cravings into other channels. Might the Peace Society not promote international horse races and yacht races? But even these might lead to war, for soldiers in peace manœuvres sometimes come to fight in earnest. Thus

wars and rumours of wars send a thrill through the civilised world. Each member of each civilised state is affected by such events; but the relations are indeterminate and incoherent,—political, moral, sentimental, economical. As humanity became organised into states, with members holding definite relations to each other, the relations of foreigners became definite, implying definite acts and forbearances, which are enforced by law. When states are small and near, alliances and treaties of alliance give legal embodiment to the idea of solidarity. When the world has become one state, it is impossible for states to keep free from the quarrels of their neighbours, and at the same time it is undesirable that every war should be universal, and that the whole world should be perpetually at war.

This has led to the modern conception of neutrality and the related group of legal rules. If even enemies cannot entirely cease to be friendly, they have to resort to the device of carrying on correspondence through friendly neutral powers, of making all trade, except in contraband, as free as usual through neutrals, except where required by the strict military necessity of blockade. A war is a great national undertaking, and if the state is recognised, neutral powers will do nothing to protect their subjects who mix themselves up in the conflict by carrying contraband or running blockades. The rules of blockade and

contraband are in the first place municipal, but other states recognise them if they are kept within limits of moderation. If they exceed these limits, other states may compel the belligerent to alter his municipal regulations.[1] The process of compromise and adjustment is the same as in all law; and the rules of contraband and blockade in war are evolved in the same way as sanitary laws affecting foreigners, or regulations dealing with the export and import of cattle.

But the latest development of the laws of neutrality —Foreign Enlistment Acts—are expressly municipal, and they were formulated before the doctrine was laid down that states are bound, under pain of war or of paying the damage directly and indirectly due to the breach of the supposed duty, actively to prohibit and prevent their subjects from taking part in hostilities. The first statutes were to prevent the enlisting of soldiers in the territory of the legislating state. No state wishes to have its harbours made into arsenals for a foreign belligerent. The result might well be that the real battles in the war

[1] See the "Franconia," 2 Ex. D. 63, and Sir James Stephen's examination of it, *supra*. The elaborate quotations from foreign jurists merely showed how far foreigners were likely to acquiesce in the municipal legislation of Great Britain. Phillimore (*Int. Law*, I. 55) points out that special laws on the subject of international law may be quoted against a state. This was done largely in the Alabama and in the Behring Straits arbitrations.

would be fought in the waters of the neutral. If Great Britain will build ships for one belligerent, the other in self-defence might blockade the Thames, the Tyne, the Mersey, and the Clyde, to prevent the ships escaping. If the enemy is weak, as in Madagascar or Cuba, the Foreign Enlistment Act is allowed to sleep. If the belligerents are two great powers, neutrality (strict and absolute) is the only alternative to taking a side. If one side has lost in consequence of being unable to purchase in British markets, it will be easier to incur its ill-will than that of its successful enemy. But, as the Franco-German war showed, the victorious side may grumble at neutrality as increasing the difficulty in attaining victory. Practical considerations of interest, therefore, again coincide with the theoretical idea that the powers are equal. Other states, which have been unable to prevent or heal the breach, may not interfere, and can do justice only by preventing their subjects taking part in the struggle. There is, of course, the difficulty that a state might through its government profess neutrality, while all its subjects were actively employed in supporting one side. To prevent this the state must be interpreted as covering both government and subjects. Further, if the rule is announced beforehand and rigidly acted on, no one can complain. If foreign states wish Birmingham rifles, Clyde ironclads, or Krupp guns, they know now that they must lay up

a good store in time of peace. If they have no resources they had better not fight. Thus the practice of nations as usual accommodates itself to changes in law and theory.

If the municipal laws of independent states are different, collisions are inevitable. These are solved on principles the same as those of private international law—*e.g.*, a prize court administers the *lex fori*, and judgments of condemnation *in rem* are recognised everywhere. Then collisions are evaded by assuming that the courts are administering a general law—*lex maritima*, or *jus gentium*—the law of nations; and still more so by treaties which make the rules identical in many states. If the particular judgment appears open to criticism, it is assumed to be merely an error of the judge, within the limits of his authority. But, as has been pointed out above, neutrals acquiesce in each state making rules and administering them, provided they do so impartially. It is only occasionally that diplomacy and political action interfere. In other words, each state legislates for itself, and the recognition of its laws by foreign states is tacit. If foreigners wish to modify the domestic legislation of another state, the action is political, through diplomatic representatives.

The following is an instructive concrete example of this mode of procedure. The facts are sufficiently stated in a letter from Earl Granville, then British

Foreign Secretary, to Consul Medhurst at Shanghai, of 12th April 1871.[1] He says: "I have had under my consideration, in communication with the law advisers of the Crown, your despatches of the 25th of January and 1st February, reporting the circumstances connected with the capture of the barque 'Robert Rickmers' by the officer commanding the French Naval Squadron, and I have now to state to you that *it has been the long established rule of the French prize courts* not to allow the sale of an enemy's vessel to a neutral after the commencement of war, to change its national character, so as to exempt it from capture on the high seas. *The right of France to observe such a rule* cannot be impugned, and the French courts have acted upon it, both when France was at war with England in 1801 and when she was the ally of England against Russia in 1854. Under these circumstances, although Great Britain may be content to observe a milder rule, as in the case of the 'Ariel,' upon which Mr. Rennie relied in advising you, the rule of the English courts is not binding upon France."

Now the parallel between this decision and an ordinary case of private international law is complete. F brings an action in Scotland to enforce the judgment of a French court. The defender says the

[1] Correspondence respecting the capture of two vessels, Franco-German War, No. 5, 1871.

judgment is wrong, mistaken both in law and fact. The Scottish court answers as Lord Granville did: "The French court had jurisdiction and right to pronounce this judgment. We cannot interfere with it. The *lex fori*, as embodied in a final decree, cannot be impugned." In the one case it is the tribunal that is recognised in the interests of order; in the other it is the legislature, as well as the prize court. In matters of legal procedure the *lex fori* is supreme in private international law; in matters of belligerent conduct the *lex civitatis* (if you wish a legal formula) is supreme in public international law. But it must be a *lex* possessing all the characteristics of law. If the rule is wavering and uncertain, it becomes unjust; it is no rule. Each nation expects the same treatment, and that the most favourable. The "most favoured nation clause" is now read into all municipal law dealing with foreigners. Within the limits of the rule, the belligerent court is presumed to be right. It has the same right to go wrong that is accorded to municipal courts, whose judgments for the sake of peace are declared final.

The remarks of Lord Justice Lindley, quoted at the outset, apply to books on public as well as on private international law. The natural shape taken by a treatise on international law is that of an account of the native law on the subject, and a statement of how the native courts will deal with foreign laws that differ.

Instinctively each writer uses the practice of his own state as the basis of his work. If he has philosophical tendencies, he criticises the rules in comparison with those of foreign states, and tries to form an ideal code. If his tendencies are historical, he gives the history of each rule, and states the rules adopted abroad, and tries to state the one rule towards which they appear to be tending. The former plan is Bluntschli's; the latter Hall's. In both cases the results are scientific and not practical. There may be many rules all illustrating one principle. It is the many rules, administered by the courts, which are law.

Hitherto we have confined our attention to treatises dealing expressly with international law, but if the view here maintained be sound, we should find international law occurring and recognised in the authorities of the municipal law. And this is precisely what we do find.

Military codes, such as the British Articles of War, have already been mentioned as examples of municipal legislation dealing with foreigners. The revenue laws illustrate the same principle. By these statutes (Hovering Acts) jurisdiction is assumed over large tracts of sea without remonstrance from foreign powers.[1] The maritime codes of the Middle Ages in varying degrees, and particularly the *Consolat del Mar*, were

[1] *Cf.* Stephen's *Hist. of Crim. Law*, ii. 42. American case in Behring Seas Arbitration, U.S. No. 6 (1893), p. 232, &c. &c.

municipal codes with wide assumed jurisdiction. This last may be regarded as the maritime common law of Europe.

The famous ordinance of 1681 of Louis XIV. was long ago recognised as another example. Of this code Sir W. Grant remarked:[1] "When Louis XIV. published his famous ordinance of 1681 nobody thought that he was undertaking to legislate for Europe merely because he collected together and reduced into the shape of an ordinance the principles of marine law as then understood and received in France. I say as understood in France, for although the law of nations ought to be the same in every country, yet, as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not at the period now referred to supposed that one state could make or alter the law of nations, but it was judged convenient to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. The French courts have well and properly understood the effect

[1] Wheaton, *Hist.*, i. 150: *International Law* (Boyd), 24, quoted with approval by Ortolan, *Diplomatie de la Mer*, ii. 103.

of the ordinances of Louis XIV. They have not taken them as positive rules binding upon neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation." It is evident, from the opinion of M. Portalis, quoted by Wheaton,[1] that this last sentence only means that the French prize courts in administering the ordinance were guided by a broad equity, and would not condemn an innocent neutral vessel because it happened not to comply with the precise letter of the ordinance with regard to the papers in its possession.

Passing to America, one of the most valuable recent contributions to our subject is Dr. Wharton's Digest. The title is notable—*A Digest of the International Law of the United States*, &c. In section 8 of this work we find the following statements: "Even as to a matter of municipal law the *lex fori* should be so construed as to conform to the law of nations, *unless the contrary be expressly prescribed.*" "An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, nor should it be construed to violate neutral rights or to affect neutral commerce further than is

[1] *Hist.*, i. 151.

warranted by the law of nations *as understood in this country.*" "The law of nations should be respected by the Federal courts as a part of the law of the land." "The intercourse of the United States with foreign nations, and the policy in regard to them, being placed by the constitution in the hands of the Federal Government, *its decisions upon these subjects are,* by a universally acknowledged principle of international law, *obligatory upon every citizen of the Union.*" "The law of nations is considered as a part of the municipal law of each state."

Sir Henry Maine[1] quotes these passages, and deduces from them what he calls the American doctrine —that international law has precedence of both federal and municipal law in America; and contrasts with it the views expressed by the common law judges in the case of the "Franconia"[2] as a sort of British view, which had to be corrected by a special act of Parliament, that the assent of a nation is necessary to subject it to international law. But the words in the Digest which have been italicised in the above quotations show that American lawyers recognise the power of their legislature even to contradict the law of nations, provided it is done expressly; and they further emphasize the fact that there is always a "personal equation" in administering law, so that

[1] *Int. Law*, p. 36.

[2] 2 Ex. Div. 63.

even international law is not precisely the same in America and in Great Britain. On the other hand, the opinions of Lord Cockburn and Lord Coleridge should be read in the light of the question submitted, viz.—Whether the German master of a German ship could be convicted in the Central Criminal Court, London, of manslaughter, in respect he had negligently run down another ship within three miles of the English coast, whereby a passenger was drowned? This was a question of English criminal jurisdiction, and afforded much scope for archæological and other learning, but none for the rhetoric which naturally finds a place in public state documents. But is the doctrine exclusively American? In the Court of King's Bench in 1764—twelve years before the Declaration of Independence—it was held that the English secretary to a foreign minister should be protected from arrest.[1] Lord Mansfield in delivering judgment reviewed older authorities, and said: "Lord Talbot declared a clear opinion 'that the *law of nations* in its *full* extent was *part of the law of England.*'[2] 'That the Act of Parliament [7 Anne] was *declaratory*, and occasioned by a particular incident.' 'That the *law of nations* was to be *collected* from the *practice* of different nations and the authority of *writers.*' Accordingly he argued and

[1] Triquet *v.* Bath, 3 Burr. 1478.

[2] The italics are in the report.

determined from such instances, and the authority of *Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c.*, there being no *English* writer of eminence upon the subject.[1] I was counsel in this case, and have a full note of it. I remember, too, Lord *Hardwicke's* declaring his opinion to the same effect, and denying that Lord Chief-Justice *Holt* ever had any doubt as to the law of nations being part of the law of England upon the occasion of the arrest of the Russian Ambassador." The American doctrine, therefore, discovered by Sir Henry Maine was a part of the common law of England taken over by the colonists. It is undoubtedly now American in the same sense as the language in which it is expressed is the American language.

Chancellor Kent, in the second sentence of his great work, says: "During the war of the American Revolution Congress claimed cognisance of all matters arising upon the law of nations, and they professed obedience to that law 'according to the general usages of Europe' (ordinance of the 4th December 1781, relative to maritime captures)." As a monarch who executes the law, and is in some sense above the law, swears to obey the law, so a new nation, entering for the first time the society of nations, may undertake

[1] Note by Reporter.—"Qy. 4 Inst. 152, and a celebrated treatise by Dr. Zouch, 'De Legati Delinquentis Judice competente," which has undergone several editions."

without any inconsistency to obey the law of nations, while it is necessarily bound to discover, enact, and enforce this law according to its own views of what is just and right, and according to the circumstances to which it is to be applied.

But Sir Henry Maine's statements are all the more surprising when we find Blackstone[1] in his Commentaries, published before the United States were really a state, using the very words of the "American" doctrine, that "the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and *is held to be a part of the law of the land.* And those acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilised world." This chapter deals with offences against the law of nations, but incidentally he refers to the law merchant and other topics.

The last authority to which reference may be made in this connection is Stair, who published his *Institutions of the Law of Scotland* at the end of the seventeenth century. He says[2] that "the law com-

[1] IV. 67. *Cf.* Stephen's *Comm.* (12th ed.), iv. p. 188.
[2] I. i. 11.

mon to many nations is that which is commonly called the *law of nations*, which stands in the customs owned and acknowledged by all or at least the most civil nations. . . . And oft-times by the common law we understand the Roman law, which in some sort is common to many nations." From the examples it is obvious that the law of nations with him is wider than what is now understood to be international law.[1] Further,[2] he devotes a title to "Reprisals, where, of Prizes, &c." This is a valuable chapter in the history of the independent Admiralty Court of Scotland. It deals with neutrality, contraband, and capture generally, though more particularly in their relation to the private law.

The titles which have been from time to time given to what is now called international law show the same struggle between a universal and a local authority. The following remarks of Lord Stowell, often quoted, illustrate this:[3]—"The seat of judicial authority is indeed locally *here*, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of

[1] See below, pp. 105-107.

[2] Book II., title ii.

[3] The "Maria," Tudor L.C. (Mercantile) at p. 895. Clark's Tracts, p. 222.

Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law on this matter, I mistake that which I consider, and which I mean should be considered, as the *universal* law upon the question." Once more, in the case of the United States of America *v.* M'Rae,[1] Vice-Chancellor James is reported as saying that it was "clear *public universal law* that any government which *de facto* succeeds to any other government . . . succeeds to all the public property . . . of the displaced power."

So also in public documents. We have already noticed the official title of Wharton's Digest. In the great Congress held at Washington in 1890 by the American republics, a form of treaty was signed in which the first article declared that the republics adopt arbitration as a principle of "American international law."[2] This points to a localisation of special rules.

In text-books we find such phrases as the "universal law of nations" (*le droit des gens universel*) used by Wheaton.[3] A few pages[4] later he quotes the phrase

[1] L.R. 8 Eq. 69, at p. 75 ; Pitt Cobbett, p. 15.

[2] *Rev. de dr. int.* t. 22, p. 544 ; on p. 542 arbitration is called "une règle de droit public américain."

[3] *Histoire*, i. 152.

[4] *Ib.* p. 158.

from Bynkershoek "*Jus gentium commune.*" The Abbé de Mably calls his work "*Le Droit Public de l'Europe,*" and Mr. Reddie[1] mentions a later work by Professor Neyron of Brunswick, "*Principes du droit des Gens Européen,*" &c. Klüber calls his treatise "*Droit des gens de l' Europe,*" and Lampredi publishes his under the name "*Juris Publici universalis Theoremata.*"[2] So great and so recent an authority as M. Théodore Ortolan, who wrote for the practical guidance of officers in the French navy, discusses the title of his book in the preface. He says that his aim has been "Exposer le plus clairement possible, les règles internationales maritimes les plus usuelles et les plus importantes, celles qui sont *à peu près universellement reconnues,* et qui forment la base des relations par la voie de mer entre les peuples policés," and he avoids as far as possible the sphere of diplomacy.[3] He calls his book "*Règles Internationales et Diplomatie de la mer,*" but expressly recognises that the rules are not universal, for he refers to a universal code of public maritime law as still a dream, and the passage above quoted shows that the mere fact that rules were not universally recognised did not in his opinion prevent them being truly international.

[1] *Inquiries in International Law,* 86.
[2] *Ib.* pp. 132, 133.
[3] *Dip. de la mer.,* xii.

The foregoing discussion has illustrated the continuity of law, politics, and morals, and of the various sciences which deal with these phenomena. We might have gone further, and shown that etiquette and manners belong to this same class of phenomena, and in international practice are hardly distinguished either from them or each other. The demonstrations against foreigners, which are seen like an epidemic affecting every nationality in turn, may be due only to bad manners. It may be that the pushing mercantile type of humanity is deficient in chivalry and polish. The nation aggrieved may hastily assume that the conduct complained of arises from malice or unwarrantable greed of a whole nation, and hasty acts or even words on either side may lead to open rupture, for it has ever been one of the commonplaces of historians and philosophers how trifling are the causes that lead to war. In such cases nations are mobs, and liable to panic. The Stoic philosopher held that the man who wantonly killed a cock was as guilty of murder as the man who killed his own father; and so an insult to a flag may be, internationally, more serious than a massacre. It is the first duty of governments not to lead the panic, but to moderate and regulate the opinion of the public; and a like duty rests on that portion of the public which can give an articulate expression to its opinions. In the recent discussion between this country and America,

the churches, the legal profession, the universities, literary men, and mercantile bodies all gave an overwhelming support to the cause of peace. The sentimental irritation on both sides subsided before it gave rise to the legal relation of war. On our side it must be admitted that much of the music hall patriotism and some of the comic newspapers afforded examples of the very worst manners.

We may now sum up the result of our discussion, and the conclusion seems to be the following:—*First.* Laws are called international because they affect foreigners, and the states to which such foreigners belong expressly or tacitly acquiesce because they themselves wish similar privileges,—*e.g.*, modes of warfare, enforcement of blockade, capture of contraband, &c. The comparison of such rules may be scientifically treated as a branch of Comparative Jurisprudence. *Secondly.* Partly in order to simplify collisions with foreigners, partly out of deference to protests, partly from compulsion by foreign governments, and partly from mere imitation, the laws of different states regarding foreigners are made identical. This may be done by the common law or by treaty and statute. Piracy is an example of the operation of the former; the prohibition of the slave trade and the laws of copyright illustrate the operation of the latter. These laws are called international not only because they affect foreigners, but because they are

enacted and enforced simultaneously by different governments. *Thirdly.* A state may for a special purpose regard itself as a juridical person, and treat another state in the same way with reference to some claim made by the one against the other. In other words, it may put a political question in a legal form. This also is international law. It is enforced by a nation against a whole nation, each being in general represented by its government. Great Britain may thus claim from Turkey fulfilment of the obligations undertaken in the Treaty of Berlin. This does not raise precisely the same question as if Abdul Hamid had sold a cargo of coffee to John Bull and Company. There are advantages and also disadvantages in taking a legal view of the subject. The advantages are great and obvious. Without something like a bargain, some African chiefs would not feel bound to abandon cannibalism. Without a treaty to appeal to, some neutrals would be disposed to remain neutrals. Then an appeal to precedent and rule involved in law secures that the parties in their discussion never stray very far from facts.[1] No doubt the

[1] The point is of interest in human psychology. The emphatic suggestion of a rule, though it may be only one out of an infinite variety, tends to make the rule be accepted as absolute truth. Habit has also much to do with the acceptance of rules. It saves so much trouble to know that people who differ from us in religion are utterly and entirely wrong; and that in politics it is impossible for the opposite party to do or say anything right, and that foreign nations must always

questions are all questions of policy and politics, but if we habitually regard them as "above and beyond the domain of law," we may have difficulty in finding where they really are. The chief disadvantage of the legal view is that it is hard to persuade men that a law which has once been living can ever die. Superstition worships the corpse which it ought to bury.

Rules dealing expressly with the collisions of public laws—*e.g.*, the independence of States, *locus regit actum*, &c.—may be classified under any of these heads. They stand on the border line of law and politics.

Historically we meet first the rules of the first class. It was fear of the anger of Jove—*i.e.*, the fear of reprisals—which disposed men to modify their hostility to strangers. And though all three classes of international relations may be seen at the present day, it is the third class which impresses the imagination of the vulgar, and in some quarters seems to be equivalent to international law *par excellence*. These persons seem to imagine that the forces of nature are asleep except in floods and storms. They forget, or rather it has never occurred to them, that the day's roaring flood is only a small part of the result of months of imperceptible

give way. Having his mind made up on those vital questions, the individual can reserve his energies for pursuits more adapted to his moral character and intellect.

and silent activity. The true relations of states are not in occasional wars, but in the incessant throb of steam-commerce by sea and land, the feverish activity of the universal postal union, the nervous network of telegraph lines, in the exchange of literature, art, and science,—forms of intercourse which war itself cannot stop. International law, which deals with these multitudinous details, has thus become true law, for legal phenomena are continuous. On the one extreme we have equity and justice, vague indeterminate aspirations; on the other, definite laws, statutes, decrees; and between them a borderland that is common to both. Through the labours of statesmen and publicists the area of the definite is growing at the expense of the indefinite. Stable and enduring governments, definite boundaries of territory, and definite peaceful aims of the members of states, with definite rules for cases of collision—a true and yet narrower law of nations—all make for peace.

The theory that reduces all constitutional relations to a legal contract or to an absolute command, which the subject must absolutely presume to be right, is similar to the theory that reduces all international law to the doctrine of recognition. Both principles are equally barren in affording guidance for details. They both reduce politics to a legal formula; the one adopted by Hobbes from his horror of civil war, the other put forward by Lorimer as the foundation

of his scheme for abolishing international war: the one dealing with the state as a leviathan, the other dealing with the family of nations as a group of leviathans. The nations of the world have attained much freedom in spite of their practical rejection of the gospel of Hobbes, and yet they are nearer peace than they were in his day. And so international peace is to be achieved, not by clumsy adaptations of the British constitution with all its anomalies to the European and American state-system, not by treating the rivalries of nations as if they were competitions between railway companies, but by the reform and improvement, intellectual, social, moral, and religious, of the humble individual units who compose those states, by the enforcement and protection of private rights, by the administration of equal justice to native and foreigner, and by the freest intercourse, commercial, literary, artistic, scientific. If mankind feel themselves to be really one, war will become impossible. And just as order is kept within the modern state not by police force, but by the powerful force of public opinion, and by the still greater force of the individual habit of obeying the law, so in the greater society of nations the same political forces will secure not only "deference to solemn precedents and established rules," but that higher sense of justice which sometimes appears to go beyond the domain of law itself.

III.

THE LAW OF NATIONS IN THE SCOTTISH COURTS.

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THE phrase "private international law" may be conveniently employed to denote that group of laws and legal principles which are invoked when we seek to determine the rights in one country of persons domiciled in another; or the rights of persons in one country over property situated in another; or the rights claimed in one country arising from acts done in another; or from obligations undertaken to be performed in another; or from decrees pronounced in another; or, finally, when we desire a decree which may come to be enforced against persons or things abroad. It may be admitted that the phrase is inaccurate, but, as I have pointed in the winter course of international law, the transposition of the terms is a doubtful improvement.[1] We gain nothing by pouring the new wine of modern jurisprudence into a bottle which has long ago been rent into shreds; and I therefore propose to do with "Private International Law" as Bar does with the corresponding German phrase, to use it as a name and nothing more.

[1] The German phrase "Internationales Privatrecht" is analogous to the English one "international copyright." Wheaton (*Elements*, 1st edn. p. 143) speaks of the "international bankrupt law of America."

Down to the end of the first quarter of the present century this subject was treated by our lawyers as part of the law of Scotland, and dealt with under the name of the law of nature and nations. As it has now been made by the Universities Commissioners a separate alternative course for graduation, it may not be unprofitable to commence our course with such a slight examination of the earlier Scottish authorities as will show us the subject gradually differentiating itself from the general principles of equity and the public law of nations, and taking its place as a department of the municipal law.

The earliest provisions in our law for the case of foreigners dealt with their privileges in suing actions. Thus Balfour,[1] founding on cases decided in the years 1533 and 1534, one at the instance of the "Merchandis of Avinzeon," and another at the instance of "William Wodhous Inglishman," says: "Ane stranger persewand ony actioun or cause has privilege[2] to be callit be the ordour of tabill, and his actioun sould be heard summarlie upon a simpill supplicatioun, without the rigorous observatioun of the form and ordour of uther proces"; and if doubts are raised as to the authenticity of the procuratory produced by him, it is to be nevertheless admitted on

[1] *Practicks*, p. 292. *Cf.* Burrow Lawes, ch. 27.

[2] There were grave irregularities in the order of hearing the causes of natives prior to the passing of the Act of 1672. Stair, IV. ii. 5 and 6.

his finding caution. The preceding chapter, founding on a decision dated 18th February 1532, shows that the practice of proving foreign law was then in force, but in the particular case, though Balfour states the rule as if it were general, the foreign law was not founded on by the foreigner suing, but pleaded against him. "Gif ony stranger," says Balfour, "comis in the country to persew ony subject thairof for ony cause, and intentis it aganis him in the quhilk the said subject defendar makis ony alledgeance quhilk mon be provin in ane uther realme; the Lordis of counsal aucht and sould direct thair commissioun to the ordinar jugeis of that realme within the boundis quhair best knawledge may appeirandlie be had of the said alledgeance, at the opinioun of the said defendar: And the partie persewar being warnit *apud acta* to compeir at certane day and place, conform to the said commissioun, befoir the jugeis contenit thairintill, to heir and sé probatioun led and deducit upon the said alledgeance befoir thame." Provision is then made for expenses according as the defender proves or fails to prove his averments. It will be noted here that the question put to the court is not the modern one of the relevancy of the averments, but simply that of the truth or falsity of the defence.

Stair reports a case[1] where such a remit was made

[1] Master of Salton *v.* Lord Salton, 1673, July 5, Mor. Dict. 4431.

to the Presidial of Rheims, in France, but the averment as to the custom of Rheims was there made by the pursuer.

By an Act of James IV. passed in 1503 (c. 32), it was provided that the Conservator of Scotland in the Low Countries should decide, with the assistance of six assessors, causes between Scots merchants abroad. And such merchants were forbidden under a penalty of five pounds to "persew ane other before ony other juge beyond se." No reference is made to the law which should be applied, but it may be assumed that the court would necessarily apply Scots law, and besides, as we shall see, mercantile law had much in common with the local Dutch law. Moreover, the law of the nationality of allegiance was then founded on in Scotland, as we see in what was long the leading case of *Galbraith* v. *Cunningham.*[1] In this case the court deliberately decided the relevancy before remitting the "custom of Ireland" to probation.

During the seventeenth and the eighteenth centuries the ordinary authorities quoted in the courts were the *Corpus Juris Civilis* and the commentators, particularly in later years John Voet. The second-hand book-stalls of Edinburgh still exhibit his immortal folios, but the prices show that the buyers are few. The phrases law of nature and the law of

[1] Nov. 15, 1626, reported by Durie, 232, Mor. Dict. 4430.

nations were often on men's lips, and they always carried with them associations of Ulpian's definitions. This may be best shown by a few quotations from Stair's *Institutions.* In the first title of the first book he deals with common principles of law, and gives a number of divisions of law; and in section 1 he appears to identify law with the sovereign divine law, eternal law, and the law of nature. "(§ 3.) Divine law is that mainly which is written on man's heart, according to that of the Apostle" [St. Paul]. . . . . "This is the law of nature, known naturally either immediately, like unto those instincts which are in the other creatures, whereby they know what is necessary for their preservation. So the first principles of this natural law are known to men, without reasoning or experience, without art, industry, or education, and so are known to men everywhere through the world, though they keep no communion nor intercourse together, which is an unanswerable demonstration of the being of this law of nature. . . . . Such are the common practical principles, that God is to be obeyed, parents honoured, ourselves defended, violence repulsed, children to be loved, educated, and provided for." This seems to identify the law of nature with the law of nations. We know a principle to belong to the law of nations, because all nations adopt it; for the same reason it is also a part of the law of nature. In the following section

he includes logical principles in the law of nature. "(§ 4.) With these common principles, with which God hath sent men into the world, he gave them also reason, that thence they might by consequence deduce his law in more particular cases; and this part of the *natural law* is called the light or law of reason, and is called by Solomon, 'The candle of the Lord, searching the inward parts.' (§ 5.) This law is also called conscience. . . ." "(§ 6.) This law of nature is also called equity." . . . "(§ 10.) Human law is that which for utility's sake is introduced by men. . . . And though that be only the law of man, which is voluntary and positive, constitute by man; yet equity and the natural law, in so far as it is allowed, declared and made effectual by man, is in so far accounted among the laws of men. The laws of men are either common to many nations or proper to one nation, or peculiar to some places or incorporations in the same nation, as were the municipal laws in the Roman Republic. And such are still in most nations, not only in matters of lesser moment, but in the highest matters of private rights, as in succession, which is diversified in many provinces of France, Germany, and the Netherlands, and England, as may be instanced in the Gavel-kind of Kent." (§ 11.) "The law common to many nations is that which is commonly called *the law of nations*, which stands in the customs owned and acknowledged by all, or at

least the most civil nations. Which for the most part are nothing else but equity and the law of nature and reason. . . . This law is chiefly understood when the common law is named among us; though the English so name the common current of their civil law as opposite to statute and their late customs, which is sometimes so taken with us. And oft-times by the common law we understand the Roman law, which in some sort is common to many nations." The closing sentence of section 10 above quoted evidently refers to the subject of our present discussion, but the author has in view a common law—a law of nations—in succession that overrides particular local laws.[1] In the course of Stair's work we constantly meet the phrases, "law of nature and reason," "natural reason," when in his opinion, generally fortified by holy writ, there is no room for argument. In one passage,[2] where he discusses the nature of charity, he says: "'Tis true that by the positive law of nations, or other consociation, there is in the very nature of the association a duty of assistance for the common interest into which they are associate; but this is not a natural but a voluntary obligation," &c. Stair thus viewed the law of nations as a body of true positive laws, which arose from the fact that foreigners came to be associated in trade or otherwise.

[1] *Cf.* the English idea of the *common* law,—Pollock and Maitland's *Hist.*, i. 155; *Jus commune*,—Bartolus (Guthrie's Savigny, pp. 436, &c.).

[2] I. iii. 5. Compare Brodie's and More's editions.

There are a few short passages in Stair which directly refer to our subject. One of these is in the title of the first book above quoted (§ 16), where he discusses how far the law of Scotland regulates the succession of Scotsmen dying abroad. Nine cases are cited. Several of the decisions are not in accordance with modern views, and in others, though the result may be right, the reason given is what the courts would now call wrong. The same topic is dealt with in Book III., tit. 8, § 35, in a passage which is also open to adverse criticism. It is laid down in the former section that foreign law is matter of fact, to be proved by the declaration of judges.

Another passage may be quoted, in the title on Assignations,[1] where he says: "Intimation being by our proper custom so necessary a solemnity, it holds not in the orders which stand for assignations among merchants, strangers especially, *qui utuntur communi jure gentium;* and therefore the first order by merchants, direct to their debtor here, to pay the debt to the obtainer of the order, was preferred to arresters and assignees using diligence before them, though there was neither intimation of the order nor acceptance by the debtor."[2] This again points to a common commercial law — a *jus gentium* — which supersedes a local law and ignores any conflict.

[1] III. i. 12.

[2] July 8, 1658, Cuthbertson *contra* Wallace, &c. (quoted by Stair).

In Stair's time the tendency to avoid conflicts must have been increased by the constant reference to the Roman jurists and the modern doctors, especially if there was no precise Scottish precedent to which appeal could be made. It was not difficult to show that the Scots law was the same as the foreign, just as a modern judge who does not know the foreign law is tempted to prove that justice can best be met by applying the *lex fori;* and it must be remembered that decisions were not then held to be of the same force as is attributed to them in modern practice.[1] Thus we find Stair constantly appealing to the laws of the Romans "and other nations,"[2] and when these fail the law of nature is always a solid rock.

As a final example of the confusion on this subject in Stair, we may take the following:[3]—"Prescription, although it be by positive law founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves; yet hath it been since received by most nations; but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations, as to the matter, manner, and time of it; and therefore nations under no common authority do not properly prescribe against each other, albeit by long patience and not contradiction their consent may be inferred

[1] Stair I. i. 16. [2] *E.g.*, I. vii. 3. [3] II. xii. 9.

even by the law of nations." The last clause appears to mean that persons of different nationality under different governments could not plead prescription against each other by strict law, but in his opinion might plead "*mora*" by equity. This view brings Stair's doctrine nearer that afterwards held by Kames.

Bankton, whose Institute is more than half a century later than Stair's, devotes eight consecutive sections to this subject.[1] He says: "Each country is only governed by its own laws, *i.e.*, the laws of their own institution, or those received and authorised among them, though common to other nations. But, for expediency, it is everywhere received as the law of nations, and particularly obtains with us, that deeds granted abroad conform to the law of the place where they are dated are sustained though defective in the solemnities or formalities required by the law of the place where they are sued on; because the obligation being once effectual must remain so," &c. Foreign law is matter of fact (§ 77). The English prescription is held to apply to English deeds, and payment of such bonds may be proved by witnesses (§ 78). A deed granted in England, bad according to English form, but good according to Scots form, is sustained in our courts, "but probably it would not be good to

[1] I. i. 76-83.

produce action in other countries, if not executed conform to their law, or to the law of the place where it is granted, which the law of nations supports as effectual everywhere." Sections 80 and 81 deal with foreign judgments and suits and the plea of *lis alibi pendens;* the last two treat of succession, but their doctrine is now set aside.

Here, then, is our very subject differentiated under the name of the law of nations in a chapter on common principles of law. But Bankton, in his observations on the law of England,[1] mentions the corresponding topics, but does not refer so expressly to the law of nations. He uses in one place the phrase, "Comitas, or courtesy, that is observed between nations." All this is in accordance with his doctrine, that "such of the laws of nations as are only arbitrary rules and usages, practised among nations by universal consent, may be altered according to circumstances of times and places." From the context, it may be inferred that even one nation could alter this law. Furthermore, we have in Bankton all the traditional commonplaces as to the law of nature and nations, and he tells us that the civil law was for the most part compiled from these.[2]

Erskine is the next great institutional writer of authority. He died in 1768, and his Institute was

[1] P. 44, §§ 29-31.

[2] I. i. 38.

published five years later. We find the same theological bias in him as in Stair, and the same deference to the civil law. The law of nature and the Divine law are the same. The law of nations properly comprises according to him all the duties which one state or body politic owes to another; but the laws of nations in a narrower sense, dealing with reprisals, contraband, blockade, rights of ambassadors, he would class under the positive law and not under the law of nations, because individual states by legislation often alter the rules on these subjects without giving notice to other states, and in any event such rules are conventional and arbitrary.[1] This is practically the thesis I maintained in opening the winter course of international law,[2] except that I attempted to justify the usage of still retaining the old name.

Erskine's treatment of the conflict of laws differs from Bankton's in that he does not treat the questions as a group apart, but treats them under the special subjects as part of the law of Scotland derived from the law of nations. There are two considerable passages which give expression to this view. In the title[3] dealing with obligations by words and writing he says, speaking of deeds signed in a foreign country, according to the laws of that country, "Such deeds are . . . by the practice of all civilised nations

[1] I. i. 15. [2] P. 39. [3] III. ii. 39.

supported *ex comitate* from the regard due by one state to the laws of another. And this *comitas* is founded not only on the highest policy (for without it that freedom of intercourse, which is on many occasions necessary between the inhabitants of distant kingdoms, would be greatly marred), but in the essential rules of equity. . . . *The rules for determining questions of this sort ought therefore to be drawn from the* JUS GENTIUM. *Those which follow seem to be received by our supreme Court of Session.*"

It is unnecessary to examine the rules given in the three following sections. They are given as rules of substantive law, and not merely as rules for solving collisions. How far they differ from the modern accepted law is shown by the elaborate notes of Erskine's latest editors. A single sentence from his title on Prescription [1] shows how he regarded the rules. He there says: "Questions are frequently moved concerning the prescription of debts due to foreigners and demanded in this country, whether the decision ought to be governed by the law of Scotland, where the judicial demand of the debt is made by the creditor, or by the *lex loci contractus, or by what other rule of law or equity.*" It is true that he gives authority from the civilians for the first two views, and none for the last.

[1] III. vii. 48.

What Erskine understood by the law of nations is incidentally shown by his treatment of mercantile law in Bk. III. t. ii. § 24. He says that writings *in re mercatoria* have been sustained by our usage after the example of the most civilised states. In 1708 he says the Court held a note of hand null because the writer's name and witnesses were not inserted according to Scots form. And in the following section he says: "As parties to bills of exchange are of different kingdoms or states, questions relating to them *are not to be decided by the laws of any particular state*, unless where special statute interposes, but ought to be decided according to their general nature and properties, as fixed by the received custom of trading nations." And so throughout this title we find a continual reference to the "general custom of trading nations," and he commences section 35 with these words: "Hitherto of the general nature of bills of exchange, in so far as they are regulated by the JUS GENTIUM," and then proceeds to notice certain statutory privileges accorded to them by Scots law. It is evident that Erskine regarded the law of nations exemplified in the law of bills, if not as identical with the law of nations which ruled deeds signed abroad, at least as closely related, for he treats them in the same title.[1]

[1] Similar views may be met in the older foreign authorities, *e.g.*, Grotius, *De J. B. et P.* ii. 11, 5, 3. Bar (Gillespie), p. 39.

These views survived far down into the present century. It is just seventy years ago (1826) that George Joseph Bell, in the preface to the last edition of his Commentaries,[1] said: "The law merchant is universal. It is a part of the law of nations, grounded upon the principles of natural equity, as regulating the transactions of men who reside in different countries and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states."

The distinction drawn between the law of Scotland and the law of nations as administered in the Scottish courts corresponds to the English distinction between the British maritime law and the general maritime law. A conflict of several local maritime laws might occur which would not be presented if all parties were subject to the same general maritime law.[2] This is pointed out by Brodie in his notes on Stair.[3]

The writers whom I have hitherto noticed have in general been disposed to regulate the rights of foreigners by a *jus gentium*—general laws or customs common to most civilised nations, supplemented no doubt by what the writer thought a civilised nation *ought* to enact or follow.

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[1] P. xi. *Cf.* Blackstone, *Comm.* IV. 67.

[2] See M'Lachlan on Shipping, 4th edn., p. 65; Lloyd *v.* Guibert, L.R. 1 Q.B. 115.

[3] P. 956.

suggests that the Court of Chancery should have been specially invested with the jurisdiction. It is a matter of adverse criticism that the Common Law Courts, by means of a legal fiction, have been allowed to usurp this jurisdiction. "This," he says, "may be justly considered as an usurpation of the courts of common law upon the court of chancery, which, like most usurpations, has occasioned very irregular consequences. I shall not insist upon the strange irregularity of assuming a jurisdiction upon no better foundation than an absolute falsehood. It is more material to observe that foreign matters ought to be tried *jure gentium*, and yet that the judges who usurp this jurisdiction have no power to try any cause otherwise than by the common law of England. What can be expected from such inconsistency but injustice in every instance? Lucky it is for Scotland that chance perhaps more than good policy hath appropriated foreign matters to the court of session, where they can be decided on rational principles, without being absurdly fettered, as in England, by common law." This tirade ignores the fact that by another fiction the law of nations is part of the common law of England. It does certainly strike the modern reader as amusing that Kames proceeds, in the sentences following those above quoted, to describe with due judicial solemnity the old process of citation of Scotsmen abroad by reading a writ at the market

cross of Edinburgh, and bawling to the winds and waves at the pier and shore of Leith. His conclusion is the following: "The rules that govern the session as a court for foreign matters are the same that govern it as a court of equity, for these rules are derived from the principles of justice. But it must not be held that these rules are applied precisely in the same manner. As a court of equity the session will not venture to interpose against common law, unless authorised by some general rule of equity that is applicable to all cases of the kind; but as to foreign matters, which belong not to common law, every case must be judged upon its own merits. And therefore the court here is less under restraint than in supplying the defects of common law or in correcting its rigour. Though, with respect to foreign matters, there is, strictly speaking, but one rule for judging, viz., equity, or natural justice, yet this rule in its application to different matters brings out very different conclusions."

When a lawyer is thus launched on the shoreless sea of natural justice and equity, he soon invents a compass for himself. The Indian judges, who were required to decide cases by "justice, equity, and good conscience," came to apply the technical rules of English equity jurisprudence;[1] and so the lawyers of

[1] *Cf.* Guthrie's Savigny, p. 61; Stokes' *Anglo-Indian Codes*, vol. I. pp. xvi.-xxi.; Leslie Stephen's *Life of Sir J. F. Stephen*, p. 288.

Kames' time perhaps unconsciously adopted the Roman law as the law of nations, equity, and justice. Thus Kames himself[1] treats a foreign marriage as having its validity determined by the law of nature. "According to that law, the matrimonial connection is founded upon consent solely." Neither the foreign nor the Scots law applies, and so he applies the Roman rule, "Consensus non concubitus matrimonium facit," and calls it the law of nature. He even goes the length of holding that "justice requires that a marriage be held good here, though not formal according to the law of the country where it was made, provided the will and purpose of the parties to unite in marriage clearly appear." In section 3, which deals with foreign covenants and deeds respecting movables, he deals with them as falling under a *real* statute—the *lex rei sitæ*. He explains that movables only occasionally in Scotland belonging to a foreigner are "held to be foreign effects, not regulated by the law of this country." He says that the Court of Session will prefer the next of kin according to the law of his country, and concludes thus: "If a Scotchman occasionally in England die there, the movables he carried with him ought to be held Scotch movables, to be regulated by the law of Scotland; and the English

[1] *Ibid.* III. viii. 1.

judges, were they permitted to decide *secundum bonum et æquum*, without being fettered by their own municipal law, would certainly be of the same opinion. This article demands peculiar attention. Here is a situation of things not a little singular, a situation that obliges our judges to follow not their own law, not the *jus gentium*, but the municipal law of another country." Kames, it is evident from this, had not the modern conception of the conflict of laws. The case that struck him as peculiar is the very one that would now be chosen as a type of the ordinary rule. Passing over section 4, where he again contrasts the *jus gentium* with the several laws to which the parties are subject, we may note in section 5 that he lays it down as the *law of Scotland* that contracts and deeds executed according to the law of the place are probative in this country. Section 6 treats of the effect given to foreign statutes and decrees, and he there shows that statutes have no extra-territorial authority, but may have indirect effects. "Obedience is due to the laws of our country, and to transgress any of them is a moral wrong. This moral wrong ought to weigh with judges in every country, because it is an act of injustice to support any moral wrong by making it the foundation either of an action or of an exception." This probably should be limited by the example given of purchase of heritage in a depending process. The next paragraph discusses prescriptions.

"In our decisions upon that head it is commonly the point disputed whether a foreign prescription or that of our own country ought to be the rule. This ought never to be a dispute, for every case that comes under our own law must be decided by that law, and not by the law of any other country. When the matter is accurately considered, the debate will be found to turn upon a different point, viz., whether the case in question come under our prescription." This is Savigny's view, so far as our own law is concerned; but the further question may still be asked, does the case fall also under the foreign prescription? If so, is it just to the parties to apply it here? The *lex fori* as a mere matter of procedure has not occurred to Kames.

The House of Lords has had much to do with moulding Scots law on this subject, and Kames concludes his *Principles of Equity* by giving an account of a case about a judgment of the English Court of King's Bench which the Court of Session refused to enforce, but which the House of Lords sustained, reversing the Court of Session's judgment. His criticism of the Lords' decision is that they should have followed Scottish and not English practice: "If the decree in question was agreeable to the law of Scotland it ought to have been affirmed, especially as the law of Scotland with respect to foreign decrees is not only in itself rational, but agreeable to the laws of all other civilised nations, England excepted;"—that is, the law of Scotland was really the law of nations.

We may now turn to the decisions of the Scottish courts during the seventeenth and the eighteenth centuries. These are collected by Morison in a substantial title under the word "Foreign." We find statements of the law by Morison, or in the reports similar to those of the text-writers,—*e.g.* (p. 4429): "Foreign writs formal according to the law of the place afford action in Scotland as obligatory *jure gentium.*" On p. 4446 we find the following startling view, apparently supported by good authority: "Transactions in a foreign country will be judged of as to form and effect by the law of the place so far as founded in the *jus gentium*, not where merely statutable." In *Kinloch* (p. 4456) it was said: "Whatever peculiarity may be in the practice of England, we follow the law of nations." The constant reference is to the law of nations, and such statements as "Transgressing the laws of a society is a wrong which ought to be discouraged everywhere,"[1] leave us in doubt whether the omission of a witness' name is a violation of law in this sense. We sometimes see a covert reference to public international law, as in *Edwards* v. *Prescot* (p. 4536), where it was argued that the court is bound by the law of nations to interpone authority; and in *Watson* (p. 4582) where it was stated that, "It is a common rule indeed that effect ought to be given to

[1] Grove *v.* Gordon, M. 4510, at p. 4511.

foreign decrees *ex comitate*, but the expression would be more accurate if this were styled a dictate of equity, or of the law of nature and nations." The authorities quoted are the civilians Bartolus, Rodenburg, and other Netherlanders. Latterly Kames is appealed to, and in 1791, in Hog's case (M. 4619), we find Grotius, *De Jure Belli et Pacis*, and Pufendorf expressly quoted, though the former was founded on a hundred years earlier by Stair.

A superficial examination of our Scottish law sources is sufficient to convince us that at the beginning of this century our predecessors were engaged in building up a law of nature and nations parallel to the law of Scotland,—in fact another law of Scotland for foreigners. They were making Scots law go through the same process as the Roman law, or, as in more modern times, English law itself, except that Chancery equity was for the benefit of natives, while the Roman and the Scottish *jura gentium* were for the benefit of foreigners. The Scottish courts were giving decisions, and though these were not precedents in the modern sense, they were appealed to, and reasons had to be given for disregarding them.

The stopping of development in this particular direction is a benefit which I venture to think Scotland owes to England. Though our lawyers still draw occasional inspiration from foreign sources, the closer intimacy with England has made mercantile

law eclipse a spurious *jus gentium.* The House of Lords, against which Kames felt so bitterly, was frequently appealed to, and, as Morison's Reports show, frequently reversed the Scottish court. Whether they were right or wrong, they made the law uniform, and simplified the problem presented in such cases. Instead of dealing with a protoplasmic mass of general equitable principles, the question the court now tries to solve is which of two, or rarely three or four, systems of positive law will be justly or legally applied to a particular jural relation.

Two great institutional writers powerfully contributed to the same result — George Brodie in his *Supplement* to Stair, and George Joseph Bell in his *Commentaries.* In the concluding chapter of the latter, "On the mutual relation of the Scottish and Foreign Laws in Bankruptcy," Bell remarks: "Formerly the principles of these arrangements [of the affairs of bankrupts] were ill understood, and great confusion, with a distressing variety and shifting of opinions, were the result."[1]

This very subject of bankruptcy illustrates the change that has taken place. The laws of the three kingdoms are different, yet by statute their jurisdictions are made ancillary to each other, and conflicts are now practically unknown. So in mercantile law

[1] 7th edn., ii. p. 568.

the laws of the three countries have been so much assimilated that conflicts do not arise. Even in the execution of wills, in the transmission of land by will, and in the formalities of solemn deeds and conveyancing generally, the freedom of commercial law has led the way to a more equitable procedure. On the other hand, mercantile men now see that strict attention to forms and the simplification of language in insurance policies, bills of lading, and charter-parties tend to prevent disputes, and in the end attain greater justice. Here, then, we have the mercantile law—a true *jus gentium*—affecting the old feudal and formal Scots law, and being itself in turn affected, thus preparing the way for consolidation into a homogeneous system.

The writers prior to Brodie and Bell use the phrase "law of nations." Brodie and Bell use "international law," without any qualifying adjective. The word "international" was invented by Bentham, and used by him as applied to law in his *Principles of Morals and Legislation*, published in 1789. He intended it as a substitute for the *law of nations*, applied to the public law prevailing among states. Even in this sense the word is open to criticism, for it implies a contractual relation between states—an abstraction of the government, as the state itself. In short, in Bentham's use of the term it implied a particular theory of the law of nations. I have

already explained my view on this subject so fully elsewhere[1] that it is unnecessary to dwell on the subject, but it now appears that "international law" is a name neither better nor worse than the old "law of nations," and so our Universities Commissioners have used them as synonymous, but confined their application to the *public* law alone.

Wheaton published his classical work in 1836, and adopted the title "International Law." In the chapter on jurisdiction he mentioned the leading principles of the conflict of laws, which in his final edition he expanded into a separate chapter. Here he distinguished private international law, which dealt with the conflict of laws, from *public* international law, which regulates the relations of states. Fœlix in France, and, I believe, Schaeffner in Germany, adopted the name "international" from Wheaton, but anticipated him with the distinction "public" and "private." Doubtless this distinction was not intended by Bentham. None of his reasons for the innovation of the word "international" was applicable, unless it was assumed that the private is a department of the public law. Fœlix in his first edition (published in 1843) refers to Wheaton's *Elements* for the phrase "international law," and says: "Le droit international se divise en droit

[1] P. 39 *et seq.*

public et en droit privé. Le droit international public (*jus gentium publicum*) règle les rapports de nation à nation ; en d'autres termes, il a pour objet les conflits de droit public. On appelle droit international privé (*jus gentium privatum*) l'ensemble des règles d'après lesquelles se jugent les conflits entre le droit privé des diverses nations ; en d'autres termes, le droit international privé se compose des règles relatives à l'application des lois civiles ou criminelles d'un état dans le territoire d'un état étranger." It appears that Fœlix at first condemned Wheaton's use of the phrase "international law," as applied to public international law, and limited the use of the term to the rules for solving collisions of private right.[1]

The comparison between the two branches of international law, as drawn by Fœlix, is not altogether inaccurate. In both there is a body of common laws —a *jus gentium ;* and in both there are conflicts to be resolved,[2] but in the public law the common rules are more prominent ; in the private, the solution of conflicts often appears to be the whole subject. War is not primarily the sanction for private international law, for the cases are always relatively trifling. *De minimis non curat lex.* But the wholesale denial of

[1] Lawrence, *Comm.* I. 115.

[2] *Cf.* on nationality, *Annuaire de l'institut*, 1894, p. 162.

justice may become a public wrong and involve the ultimate sanction of war.

As our academic course now stands, the old "law of nature and nations" has been split up into a number of independent subjects. The law of nature is represented still by moral philosophy, political economy, and the philosophy of law, comparative and general jurisprudence. This last embraces both the political and ethical aspects of law as treated by Continental writers and the more purely logical and formal aspects to which some recent English writers appear inclined to restrict it.

The law of nations and public international law are now, as I have just observed, treated as synonymous.

International private law, as it is termed, is the remaining topic included under the old name, and we may now note in conclusion the relations that still subsist in spite of scientific differentiation between it and jurisprudence on the one hand and public international law on the other, though the reasons for appointing the same person to lecture on all three in this university are historical and economical, not scientific or philosophical.

Private international law may be regarded as a subordinate chapter of public international law as treated by Wheaton (ch. II.). It is a part of the actual machinery by which nations carry on their friendly intercourse, and by which the civilised world

is organised into one large state-system. It is analogous to rules of nationality and of domicile, and resembles the rules laid down in such statutes as the Sale of Goods Act to assist in determining intention. It is therefore true law, enacted and enforced, and affecting rights powerfully, though indirectly, in the same manner as ordinary laws. We see its close relation to public law in the notion of reprisals. The French *Code Civil* only allows foreigners the same rights as natives provided there is reciprocity in the foreigners' own country. Similar provisions occur in our own copyright, patent, and other statutes. *Goetze* v. *Aders*,[1] in the Scottish court, illustrates the same tendency. Just as the legislature and the government may by their policy enforce international public rights, so individuals can and do enforce their own rights privately. They can boycot foreigners. English women who were not prepared to sustain the rôle of a discarded mistress of a Frenchman would refuse to marry *any* Frenchman until our neighbours had altered their very strict moral laws of marriage. And so the courts in trying to do justice to strangers in their country endeavour indirectly to secure justice to their own subjects in other countries; or do so directly by refusing redress to foreigners whose courts do not treat other foreigners with

[1] 1874, 2 Rettie (Session Cases, 4th series), 150.

reciprocity. There is less room now than formerly for the application of this principle without the actual intervention of the government and legislature.[1] So far for the law of nations. Partly owing to legislation, partly to congresses and societies having devoted much consideration to the subject, partly to the exertions of jurists, we are sensibly nearer a law of nations common to civilised states than the world has ever been in its history; and so we may say that in all its senses private international law is truly still a branch of the law of nations.

It still belongs also to the law of nature. This phrase is an edge-tool which can hardly be used with safety; but the law of nature is now usefully represented by jurisprudence and the philosophy of law. Modern legislation is rapidly restricting this vague area and settling the definite municipal law. George Joseph Bell remarks that in his time there was no legislative provision on the subject: "The matter has been left entirely to the regulation of those principles of international law which guide the connections between states, and prescribe the sanction

[1] Mr. Reddie, whose name must always be mentioned with respect for the lasting work he did in jurisprudence while the subject was neglected by the universities, maintains with great force the view that the rules dealing with the conflict of laws, though generally viewed as a branch of international law, in reality form a branch of the internal jurisprudence of a state. (*Inquiries in International Law*, 1842, p. 206.) He does not there use the qualifying adjective "private." Compare the opposite view as expounded by Dr. Pulszky (*Theory of Law, &c.*, p. 97.)

and authority which is to be allowed by each to the institutions and laws of another. Perhaps it is better on the whole that a subject so full of difficulty should thus be left to the guidance of the principles of general jurisprudence; and in the settlement of those points which have occasioned contests in the courts there is much reason to approve of and applaud the way in which the law has been fixed."[1] This appears to be almost the last struggle of the law of nature, under the name of general jurisprudence, to keep the subject within its domain. As Bar says,[2] private international law "is still treated in Germany as a sort of step-child of the philosophy of law." But the courts have now laid down the great principles on which they will refuse to recognise foreign laws and foreign rights—principles of public policy, morality, freedom,—"unruly horses," no doubt, but actually yoked to the chariot of the state, and requiring guidance. The legislature has treated material questions of nationality, shipping, bankruptcy, bills, copyright, patents, wills, succession duties, marriage, foreign judgments. The courts have laid down and followed rigid rules as to domicile, succession, prescription, and other topics. Each statutory or judicial rule is a part of the municipal law, and apparently encroaches on the domain of international law; but it has the advantage

[1] *Comm.* II. 375, 7th ed.

[2] *Private Int. Law*, preface.

of letting both natives and foreigners know their reciprocal rights, and allowing them to arrange their contracts and other legal relations in accordance therewith. The small residuum is really matter of conflict —questions undecided—as to which no lawyer can confidently advise his client. It is principally to these that the rules as to choosing conflicting laws apply. These rules are largely but not entirely logical, and belong to jurisprudence in a strict and narrow sense. It is said that these rules are for the use of judges, but this merely shows that the law is so uncertain as to encourage litigation. When modern law is definite and settled, private individuals can dispense with the assistance of the courts for the mere determination of their rights.

These logical rules of private international law do not directly decide rights, but, like rules of domicile, they do so ultimately. But it is not a matter of mere logic. The old theory of the statutes treated it as a question of grammar, and traces of this doctrine still remain in French jurisprudence and in all modern practice. Savigny and Bar have shown how on principles of jurisprudence the subject may be developed; but in Scotland we now follow the English custom of regard for precedents, and a British lawyer may be pardoned for supposing that justice is more likely to be done by an upright and skilled lawyer striving earnestly to do justice in

an actual material case, in which the parties have much at stake, after protracted and exhaustive arguments from skilled and sagacious counsel, with the preparation that these arguments involve, than by a jurist sitting in solitude working out legal categories into a symmetrical system. If our courts follow precedents and apply strict rules, it is because these lead to a result in accordance with justice and equity.

Private international law, therefore, standing as it does in close relation to public international law and to abstract jurisprudence, presents attractions both to the student of law and the man of affairs in this great city, whose growth is coincident with that of the great Western Republic, and whose commerce is world-wide. The subject is of the utmost practical importance. We open wide our gates to all the nations of the world, and while they trade or reside and enjoy the hospitality of the citizens, we admit the duty of recognising and enforcing their just rights. This university may take its share in this work, not only by training students, but also by contributing to the development and scientific exposition of the law.

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